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Law Enforcement Newsletter

FROM THE OFFICE OF THE
Attorney General
For The Commonwealth of Massachusetts

Scott Harshbarger
Attorney General

Contact:(617)727-2200

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LAW ENFORCEMENT
NEWSLETTER

Letter from the Attorney General: Legislative Initiatives to Address the Changing Face of Crime in the 1990's

July, 1992

To Members of the Law Enforcement & Criminal Justice Community:

I. Introduction

As I have stated many times before, and as all of you are aware, the face of crime has changed during the last several years and continues to change in the 1990's. Police, prosecutors and the courts are no longer responsible only for protecting the public against "traditional" street and violent crime.

Additional mandates and responsibilities have continually been thrust upon the law enforcement and criminal justice communities, while resources have diminished at the local, state and federal levels. The recent history has been that when all other societal institutions fail, we declare the conduct in question illegal, make it a crime, turn it over to law enforcement and then wonder why the problem still exists, despite the fact that there are no new resources and the fact that little is done to deal with the problem until the "end of the line."

While the effort to restore the resources necessary for law enforcement and the courts to effectively protect the public has not yet been completely successful, there are creative legislative initiatives which my office, in conjunction with many of you, have pursued to enhance the available tools for law enforcement.

In this Newsletter, I've outlined three different legislative initiatives related to areas that have become a major part of law enforcement's responsibilities:

* Stalking Law/Domestic Violence;

* Environmental Trust Fund & Forfeiture Act/Environmental Crime; and

* Statewide Grand Jury/Organized Criminal Enterprises.

Each piece of legislation seeks to adapt the Massachusetts General Laws to the changing face of crime simply by making the law more relevant to the practical realities of the 1990's, and, in the case of the Environmental Trust Fund and Forfeiture Act, actually proposing a means to direct funds back into enforcement -- at no cost to the taxpayers of the Commonwealth.

These legislative changes, and our general ability to perform our various duties, would be much more effective if we also had genuine court reform, and sentencing and corrections reform. Both of these major reform initiatives would bring more accountability, centralization and manageability to the courts and the criminal justice system, and, ultimately, would not only allow us to spend the limited resources we have more efficiently and effectively, but would also ensure a far greater means of swift, fair, equal and certain justice and protection. Although in this newsletter we are focusing on other legislation, I remain committed to advocating for these major fundamental structural changes in our system of justice.

To date, I am very pleased and encouraged that the Legislature has enacted, and the Governor has signed, a law punishing the crime of stalking and providing police officers an important tool designed to protect victims of domestic abuse. The provisions of the new stalking law are detailed in an article in this edition of the Law Enforcement Newsletter.

The two additional major bills have yet to be the subject of legislative action. The Environmental Trust Fund and Forfeiture Act attempts to deter environmental crimes by negating the profit motive inherent in many of these violations. The second bill, An Act Relative to a Statewide Grand Jury, allows the Commonwealth to attack crime that crosses county lines by efficient recourse to a single grand jury.

<u>Senate Bill No. 1538: The Environmental Trust Fund & Forfeiture Act</u>

The Environmental Trust Fund and Forfeiture Act enhances the tools available for environmental law enforcement in two ways. First, it deprives those who have been criminally convicted of environmental violations of the instrumentalities used to commit those violations and all proceeds derived from their criminal activity. Included among the items subject to forfeiture would be all conveyances, equipment, records, and research used to commit or facilitate the crime. Also subject to forfeiture would be any real property used primarily to

commit or facilitate the crime, and all monies and things of value furnished in exchange for the crime. Finally, all proceeds which were derived from the crime, including monetary savings which resulted from criminal non-compliance with our environmental laws, will be subject to forfeiture.

The Commonwealth's petition to seek forfeiture, which can only be filed upon issuance of a criminal complaint or indictment, triggers notice and hearing requirements designed to protect all interested parties. There are exceptions which protect holders of perfected security interests and other innocent property owners. Forfeiture is not permitted if the property in question was unlawfully in the possession of someone other than the owner, or if the owner neither knew, nor should have known, that the property was being used to commit the environmental crime. There is also a homestead exemption.

The Environmental Trust Fund and Forfeiture Act is modelled after the drug forfeiture statute which has been used successfully by prosecutors in Massachusetts. Forfeiture of assets would act as a strong deterrent in preventing the commission of environmental crimes. It would also give law enforcement authorities the ability to put an end to criminal pollution of our environment by seizing the instrumentalities of the polluting conduct.

The second purpose of the Act is to provide a funding mechanism for increased and improved environmental enforcement at both the state and local levels. The Act creates an "Environmental Prosecution Fund" which will be financed by:

* penalties assessed in civil enforcement proceedings brought by the Attorney General;

* attorney's fees and costs awarded in civil enforcement proceedings;

* fines imposed in criminal prosecutions by the Attorney General and district attorneys; and

* the proceeds of all asset forfeitures.

Specifically excluded from the Fund will be monies which have been previously earmarked by the Legislature for other environmental protection activities, such as the Challenge Fund and the Department of Fisheries and Wildlife's Environmental Enforcement Fund.

The Environmental Prosecution Fund will be maintained by the State Treasurer and disbursed to the Attorney General and Secretary of the Executive Office of Environmental Affairs ("EOEA"). Up to one-third of the funds disbursed to the Attorney General may be passed on to those district attorneys and local law enforcement agencies who are involved in the investigation and prosecution of environmental violations. The Attorney General and Secretary of EOEA will be required to file annual reports with both the Senate and House Ways and Means Committees, detailing expenditures.

The Environmental Prosecution Fund would enable the Commonwealth to secure additional assistant attorneys general, assistant district attorneys, training for prosecutors and investigators, personnel for local police departments, and expert witnesses and consultants.

<u>Senate Bill No. 744: An Act Relative to a Statewide Grand Jury</u>

This bill would provide an important tool for prosecutors and has the support of the Governor and the unanimous support of the Massachusetts District Attorneys' Association.

In the 1990's, all forms of criminal activity have become sophisticated, more mobile, more easily and quickly communicated from one location to another, and less likely to be limited geographically to a single town, city or county within the Commonwealth. Public protection demands that law enforcement keep pace with the everchanging nature of crime. I believe that passage of the proposed statewide Grand Jury bill is a necessary element in this effort.

At present, Grand Juries are convened in each of the individual counties of the Commonwealth. A Grand Jury sitting in Berkshire, or Hampden, or Barnstable County investigates and considers evidence relating to alleged crimes in that particular county alone. This bill will not change the interactions between Grand Juries and the District Attorneys or the Attorney General. However, it will address a severe limitation on those Grand Juries. That limitation is the county line - a boundary that criminals do not recognize but, right now, all of our Grand Juries must.

As District Attorney of Middlesex County for eight years, I saw countless examples of serious criminal conduct that occurred in our county, but also involved illicit activities in one or more other counties. It might mean that a person or

group selling cocaine in our county was also selling elsewhere; or that a con artist or dishonest businessperson was victimizing consumers in several different counties. A mechanism did not, and does not currently, exist to enable the Commonwealth to investigate in one forum the criminal activities that have allegedly occurred in multiple counties. The statewide Grand Jury bill creates that mechanism and vests in the Attorney General, with the appropriate involvement of the courts and the District Attorneys, the authority to convene and utilize a Grand Jury with statewide investigative and indicting authority.

Existing law gives the Attorney General jurisdiction to investigate and prosecute criminal cases throughout the Commonwealth. However, Grand Juries have only countywide jurisdiction. As a result, our Grand Jury investigations must proceed county by county, potentially involving as many as four or five separate county Grand Juries in the investigation of a single person, group or continuing course of conduct. As a result, our investigations must stop at one county line and pick up anew in the next county with a completely different Grand Jury simply because a criminal targeted one victim in, for example, Marlborough and another in Southborough -- municipalities which are adjacent to each other, but are in different counties. The result is that investigations are slower, more cumbersome, more disjointed and more costly and inefficient than with a statewide Grand Jury model. In fact, for these reasons alone, investigations may be curtailed or not even initiated. The sole beneficiary of the present system is the intentional, mobile, repeat-pattern offender. Local police departments recognized this ten years ago and formed regional task forces to investigate crimes without the artificial constraints of city and county lines.

An example of the jurisdictional problems posed by the present system is a case recently prosecuted by my Criminal Bureau involving an advance loan fee scheme. The defendant travelled throughout Massachusetts in 1991, convincing financially troubled homeowners to pay him a fee of $300 to $400 for his services in securing them a second mortgage on their homes so as to avoid foreclosure. Many desperate victims gave the defendant what added up to a significant amount of money. His criminal activities brought him into several counties, meaning that in attempting to fully investigate, my office was faced with the prospect of having to conduct several smaller investigations, with multiple Grand Juries, in multiple locations. In such cases, the statewide Grand Jury bill would allow for one Grand Jury, in one location, to investigate all

of the criminal conduct, no matter where in the Commonwealth it took place.

The proposed statewide Grand Jury bill is sound public policy, as well as cost-effective and time efficient. As Attorney General, I believe this bill represents an important step towards providing the Commonwealth's citizens with the best law enforcement to which they are entitled.

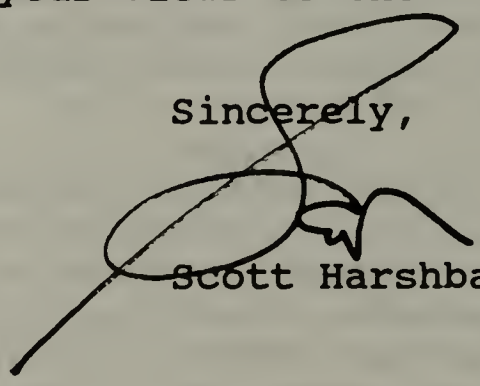
Conclusion

I have highlighted three important legislative initiatives in this issue of the Law Enforcement Newsletter. Because it is clear that law enforcement and the criminal justice communities will continue to play a major role, if not the major role, in coping with many of the societal problems which confront us in this state, we must also play a key role in determining what legislative changes are necessary to allow us to best provide for public protection and public safety (consistent obviously with our constitutional laws).

As I have said before, I do not believe that legislative changes alone can solve any problem nor ever serve as a panacea, but they can give us tools which are important, particularly in the absence of additional resources.

I look forward to hearing your views on these and other legislative initiatives (as well as your thoughts on court, sentencing and corrections reform) of interest to you, and hope that you will also express your views to the members of the Legislature.

Sincerely,



Scott Harshbarger

APPEALS OF MOTOR VEHICLE LICENSE SUSPENSIONS AND REVOCATIONS AT THE BOARD OF APPEAL ON MOTOR VEHICLE LIABILITY POLICIES AND BONDS

By: Kevin M. Ryan, Special Assistant Attorney General

Many people both inside and outside the law enforcement community are not aware that an appeal board exists in Massachusetts with the authority to order the reinstatement of motor vehicle licenses that have been suspended or revoked by the Registrar of Motor Vehicles (the "Registrar"). Pursuant to General Laws chapter 26, section 8A, and chapter 90, section 28, actions of the Registrar may be appealed to the Board of Appeal on Motor Vehicle Liability Policies and Bonds (the "Board"), which may affirm, modify, or annul rulings or decisions of the Registrar. The Board, which consists of three members, has jurisdiction over actions of the Registrar concerning motor vehicle licenses, registration plates, and inspection stations, as well as jurisdiction to hear appeals of motor vehicle insurance cancellations and surcharges. One member, who is appointed by the Commissioner of Insurance, serves as chairperson, and the Attorney General and the Registrar each appoint one Board member to serve as their representatives.

After taking office in 1991, Attorney General Harshbarger appointed me as his representative on the Board and ordered a review of Board policies and procedures concerning motor vehicle license appeals. After working for five years as an Assistant District Attorney in Middlesex County and prosecuting motor vehicle offenses including motor vehicle homicides, as well as teaching motor vehicle law at the Criminal Justice Training Council, I felt well versed in "chapter ninety" law and procedure. Nevertheless, after joining the Board I was amazed by the Board's broad authority to reinstate licenses based on hardship or legal issues and by the number of Registry appeals the Board hears every year (approximately 8,000 in 1991). The Board also received approximately 40,000 insurance surcharge appeals in 1991. The Board's staff consists of an executive secretary, five hearing officers who conduct hearings on insurance surcharge appeals, and three clerical employees.

I was also surprised to learn that the Board was regularly provided with only the appellant's driving record and perhaps a Registry "Incident Summary" on even the most serious license suspensions and revocations. Given the fact that a Registry

hearing officer presented the appellant's Registry record without argument and that no one represented the interests of the Commonwealth, the Board never heard any argument opposing the reinstatement of a license.

Pursuant to the Board's standard procedure, the appellant was responsible for providing information to supplement Registry records. The Board typically requested the appellant to supply a copy of police reports or other pertinent documents if a majority of the Board felt additional information was needed to make a decision. This of course placed the Board at the mercy of an appellant's desire to regain his or her license and the temptation to conceal or misrepresent information. The Board had no procedure in place for regularly notifying District Attorneys and police departments of pending appeals of license suspensions and revocations for serious motor vehicle offenses. In fact, a review of files from 1990 indicated that all information, other than Registry records, supplied to the Board was provided by appellants or their attorneys. There was no record of any notification to law enforcement agencies of appeals of serious motor vehicle license suspensions or revocations.

NOTIFICATION OF APPEALS TO LAW ENFORCEMENT AGENCIES

After reviewing the Board's policies and procedures it became clear that the Board generally heard only one side of every story. Additionally, by holding hearings without notifying the law enforcement agencies responsible for the suspensions or revocations, the Board was accountable to no one for its actions. As a result of his review, the Attorney General made recommendations concerning regular notification to law enforcement agencies of license appeals for serious motor vehicle offenses. Specifically, it was recommended that the Board notify District Attorneys and police departments of all motor vehicle homicide revocation appeals so that they would have an opportunity to present information that might be helpful to the Board in its deliberations. (The Board received C.O.R.I. certification in 1975.) The Attorney General recommended that the Board notify police departments of chemical test refusal suspension appeals so that police departments would have an opportunity to address any challenges to the refusal affidavit or to the underlying circumstances of the refusal. The Attorney General also recommended that the Board regularly notify police departments of appeals arising out of serious motor vehicle offenses.

In May, 1991, the Board agreed to regularly notify District Attorneys and police departments of all motor vehicle homicide revocation appeals. The director of every District Attorney's Victim Assistance Bureau was notified of the Board's appeal process and invited to contact the Board on any pending or future appeals. The Board also agreed to draft a form-notification letter now used in all such appeals (see Appendix A).

To date the Board has taken the position that due to limited clerical resources it is unable to regularly notify police departments of chemical test refusal suspension appeals. Instead, police departments are notified of such appeals on a case by case basis when a majority of the Board believes that additional information is necessary to clarify any issues raised by an appellant. The same policy applies to appeals arising out of serious motor vehicle offenses. "Immediate threat" complaints, however, are now treated differently. Effective May, 1991, the Board regularly requests the input of the complaining police department prior to considering the restoration of a license suspended as the result of an immediate threat complaint arising out of negligent or reckless driving. The Board requires clearance from the Registrar's Medical Affairs Bureau, as well as a driver competency test, prior to restoring a license suspended as the result of medical or physical issues.

Although, due to a severely limited budget, the Board is forced to maintain all records and file indexes by hand, I have assumed the responsibility for maintaining a separate computerized file system for all motor vehicle homicide revocation appeals filed since May, 1991. This system will prevent individuals who have previously lost Board appeals from filing additional appeals at random intervals during their revocation period in attempts to find a Board majority more sympathetic to their case. The Attorney General's office continues to explore ways to efficiently expand law enforcement notification procedures to encompass all Board appeals arising out of serious motor vehicle offenses.

EDUCATING LAW ENFORCEMENT AGENCIES ON BOARD PROCEDURES

Over the past twelve months, in a long overdue attempt to familiarize the law enforcement community with the Board and its procedures, I have addressed a number of police departments and District Attorney's offices at staff and roll call meetings. Any law enforcement agency wishing to learn more

about the Board should feel free to contact me at (617) 727-7189 ext. 235.

The remainder of this article is intended to provide law enforcement agencies with a brief overview of Board procedures concerning motor vehicle license appeals.

GENERAL HEARING PROCEDURES

After an individual receives notification of suspension or revocation of his or her license or right to operate a motor vehicle in Massachusetts, the individual may file an appeal of the Registrar's action to the Board. The application fee is twenty-five dollars. Upon receipt of the appeal, the Board schedules a hearing date and notifies the Registrar. All hearings are open to the public. At the hearing a Registry hearing officer presents a computer print-out of the appellant's Registry record. The appellant may challenge the validity of the suspension or revocation by arguing that the Registrar erred in calculating time periods or that certain offenses should not have been considered by the Registrar when ordering a suspension or revocation. Additionally, many appellants challenge the validity of suspensions and revocations occurring as the result of administrative errors in the preparation and interpretation of court abstracts. With the exception of alcohol and drug related revocations, the Board also considers appeals to reduce suspension and revocation periods on the basis of hardship to the appellant.

After the hearing, the Board votes in executive session to affirm, modify, or annul the action of the Registrar. The Board's ruling is determined by a majority vote. Any appellant aggrieved by the Board's ruling may appeal to the Superior Court.

TYPES OF REGISTRAR SUSPENSIONS/REVOCATIONS APPEALED TO THE BOARD

Suspension/Revocation	Reason
30 days	-three speeding tickets in one year
60 days	-operating without insurance -operating after suspension -operating to endanger -leaving the scene (property damage) -seven surchargeable events in three years (includes surchargeable accidents)

120 days	-chemical test refusal
1 year	-operating after suspension (O.U.I.) -operating to endanger (2nd off.) -operating without insurance (2nd off.) -leaving the scene (personal injury)
1 year (cont'd)	-leaving the scene (property damage) (2nd off.) -false statements on registry documents -false registry documents
2 years	-O.U.I. (serious injury)
4 years	-habitual traffic offender (12 offenses in 5 years or 3 serious offenses in 5 years)
1-5 years	-drug convictions under G.L. c. 94C -motor vehicle theft
1-10 years	-O.U.I. liquor or drugs (including subsequent offenses)
10 years	-motor vehicle homicide (all cases)
Indefinite	-immediate threat complaints -non-payment excise tax -unsatisfied judgment on motor vehicle accident -suspension status in other states (Lacey Packer law)
Life	-motor vehicle homicide (2nd off.) -motor vehicle homicide/O.U.I. after prior O.U.I. conviction

SPECIAL ISSUES

Operating Under The Influence Of Alcohol Or Drugs

The Board has taken the position that suspensions and revocations arising out of convictions for operating under the influence of alcohol or drugs are not the result of an action of the Registrar but, instead, occur by operation of statute. In those cases the Registrar acts only as the Commonwealth's record keeper, tolling the beginning and end of each revocation and issuing licenses only when an individual is eligible pursuant to statute. Accordingly, the Board will not modify

revocation periods mandated by convictions for operating under the influence of alcohol or drugs.

Chemical Test Refusal Suspensions

Appellants frequently challenge the adequacy of the refusal affidavit based on the requirements of G.L. c. 90, §24(1)(f). A majority of the Board is of the opinion that the three signatures at the bottom of a chemical test refusal affidavit must be the signatures of three separate individuals, regardless of whether the individual signing as "Police Chief or Authorized Person" was also the person witnessing the refusal or the person before whom the refusal was made. Additionally, many appellants argue that they did not refuse any chemical test or that they were never offered a test.

Motor Vehicle Homicides

The Board has traditionally taken the position that it has jurisdiction to consider any motor vehicle homicide revocation appeal based on legal issues or claims of hardship and to modify the revocation period, whether or not the conviction included the element of operating under the influence of alcohol or drugs.

CONTACTING THE BOARD

The Board regularly receives calls from Assistant District Attorneys and police officers inquiring about notifications of license appeal hearings. In many cases, the callers did not know of the Board's existence until they received an appeal notification letter. District Attorneys and police departments who respond to Board appeal notifications typically forward packages of police reports, victim impact statements, and other information they believe would be helpful to the Board in its deliberations. Appellants are given the opportunity to review and respond to all information submitted to the Board.

Any questions, comments, or information on pending or future appeals can be directed to:

Board of Appeal on Motor Vehicle
Liability Policies and Bonds
280 Friend Street
Boston, MA 02114
(617) 727-7189 ext. 223

THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF CONSUMER AFFAIRS AND BUSINESS REGULATION
DIVISION OF INSURANCE
280 FRIEND STREET BOSTON 02114
(617) 727-7189

KAY DOUGHTY
COMMISSIONER

DATE: _____

Re: Notice of Appeal of the Registrar of Motor Vehicles Action Revoking Driver's License.

_____ Name

_____ Date of Birth

_____ Social Security/License number

_____ Offense

_____ Place of Offense

_____ Date of Conviction

_____ Date of Hearing

Dear Sir or Madam:

Please be advised that the above-named individual has filed an appeal with the Board of Appeal on Motor Vehicle Liability Policies and Bonds seeking reinstatement of his/her license. If your office wishes to provide information that you feel would be useful in the Board's deliberations please feel free to forward it to our office at 280 Friend Street, Boston, Massachusetts 02114 to the attention of "Ralph A. Iannaco D.A./Police Information." The appellant or appellant's counsel will have access to all information provided to the Board regarding the appeal.

Very truly yours,

Ralph A. Iannaco
Executive Secretary

STALKING BILL

By: Robert J. Bender, Assistant District Attorney,
Essex County District Attorney's Office

On Monday, May 18, 1992, Governor Weld signed Senate Bill 1493, St. 1992, c. 31, which creates two new crimes, "stalking" and stalking in violation of a court order, G.L. c. 265, §§43(a) and 43(b), respectively. There are enhanced penalties for second and subsequent convictions of stalking, added as §43(c). An emergency preamble was signed, which made these new crimes effective at 2:30 p.m. Monday, May 18, 1992.

ELEMENTS

"STALKING:" c. 265, §43(a)

(1) "whoever willfully, maliciously, and repeatedly"

(2) "follows or harasses another person"

(3) "and who makes a threat with the intent to place that person in imminent fear of death or serious bodily injury"

"STALKING IN VIOLATION OF A COURT ORDER:" c. 265, §43(b)

(1) "whoever commits the crime of stalking"

(2) "in violation of a temporary or permanent vacate, restraining, or non-contact order or judgment issued pursuant to" G.L. c. 208, §§18, 34B, or 34C, or G.L. c. 209, §32, or G.L. c. 209A, §§2, 4, or 5, or G.L. c. 209C, §§15 or 20, or a temporary restraining order or preliminary or permanent injunction issued by the superior court.

ANALYSIS

The Legislature has recognized that some offenders have been committing serious misconduct which seemed to "borrow" elements of certain "traditional" crimes, but as a whole was not targetted by any crime. This new statute defines a new crime, "stalking," and spells out its elements with particular care to give proper notice of what misconduct falls within its scope. The new crime is not intended to replace but to complete the familiar list of offenses against persons which

have been used to address such behavior. It is certain that in the past some offenders have committed acts best described as "stalking," but until now these offenders usually could be prosecuted only for misdemeanors. Now, if every element of the crime of stalking can be shown to have occurred since 2:30 p.m. on May 18, 1992, a felony can be prosecuted in appropriate cases.

Jurisdiction and Penalties

"Stalking," G.L. c. 265, §43(a), is punishable by a fine or by 5 years imprisonment in state prison or by 2 1/2 years in the house of correction. Thus it falls within the concurrent jurisdiction of the District Court and the Superior Court. "Stalking in violation of a court order," G.L. c. 265, §43(b), also is punishable by 5 years imprisonment in state prison or by 2 1/2 years in the house of correction, but this crime carries a mandatory minimum sentence of one year, which may not be suspended or reduced by probation, parole, work release, or furlough. The statute uses the same language for the mandatory portion of the sentence as is used in G.L. c. 94C, §32H, concerning mandatory minimum sentences for certain drug offenses. This crime too falls within the concurrent jurisdiction of the District Court and the Superior Court.

Second and Subsequent Offenses

Under G.L. c. 265, §43(c), if a prior conviction for "the crime of stalking" is proven, the authorized penalty doubles to 10 years imprisonment in state prison, with a house of corrections alternative. There is a 2 year mandatory minimum term. G.L. c. 218, §26, has not been amended to bring second and subsequent offenses within the jurisdiction of the District Court. Now it is a 10 year felony within the jurisdiction of the Superior Court only. Note that §43(c) is not as clear as it should be regarding what "counts" as a "prior conviction." It is certain that repeat violations of §43(a), which is defined specifically as "the crime of stalking," are to be treated as "second and subsequents" subject to §43(c)'s enhanced penalties. The crime of stalking in violation of a court order, as defined by §43(b), is an "aggravated" form of stalking, so that logically a previous conviction under §43(b) should make the repeat offender one who has "been convicted of the crime of stalking." It may be argued, however, that §43(c) applies by its very terms only to prior violations of §43(a).

Definition of "Harasses"

As the elements show, stalking is either willful, malicious, and repeated "following" with proof of actual threat, or willful, malicious, and repeated "harassment" with proof of actual threat. The new statute defines "harasses" in such a manner that if one can prove the statutory element of "harasses," one also will have proved "willfully, maliciously, and repeatedly." To prove "harasses," one must show "a knowing and willful pattern of conduct or series of acts over a period of time," which is the functional equivalent of "willfully" and "repeatedly." This choice of language implies that to establish "harasses," it is not enough to prove that the offender committed several distinct acts (which seriously alarm or annoy) at one time or in one criminal contact with the victim. It is necessary to prove distinct acts which occurred "over a period of time." Stalking is repeated harassment. Harassment is repeated if it occurs on more than one occasion; harassment is repeated even if the offender does not repeat the first pattern of conduct but changes to a different type of harassing conduct.

The second part of the definition of "harasses" requires that the misconduct "seriously alarms or annoys the person" and is "such as would cause a reasonable person to suffer substantial emotional distress." Thus the statute requires that the victim actually feel serious alarm or serious annoyance due to the offender's actions directed at that person, and that the offender's actions be "such as would cause" any reasonable person to suffer such "substantial emotional distress."

Evidence of a Threat

The third element of "stalking," that of "and who makes a threat with the intent to place that person in imminent fear of death or serious bodily injury," cannot be overlooked. An offender who repeatedly makes such threats does maliciously harass, but one does not commit the crime of stalking by following or harassing alone. There must be proof of an actual threat. The "threat" element of stalking is "narrower" than the familiar "threat to commit a crime" offense in G.L. c. 275, §3. The threat in stalking requires proof that the offender had the specific intent to place the victim "in imminent fear of death or serious bodily injury." It is not enough that the victim feel threatened or that the offender's acts or words "seriously alarm or annoy" the victim. Proof of stalking requires evidence of the offender's state of mind or

intention. In practical terms, however, specific intent to place the victim in imminent fear may be inferred from the offender's acts or words as reported by the victim. It is not necessary to establish that "a reasonable person" would have been placed in fear by the threat, but if that is established, the inference that the offender intended to place the victim in fear is strong. In addition, specifying that the threat be made with the intent to cause the victim "imminent fear" should be read to mean that the offender intended that the victim be in fear immediately. This does not require that the threat be one of immediate harm. It is enough that the offender intend the victim to be immediately and/or continuously in fear of a harm which could occur at any time, without warning. The statute does not require that the threat be made "in person."

Stalking by Following

Finally, the mere willful and repeated following of another is not "stalking." The offender must follow "maliciously," and also must make the requisite threat. The threat does not need to occur during the act of following, and once the threat is made, the "malice" of the act of following may be more evident. It would seem that any acts of malice during the following also establish the malicious intent.

Stalking in Violation of a Court Order

Stalking in violation of G.L. c. 265, §43(a), is a lesser included offense, or necessary element of stalking in violation of a court order, under G.L. c. 265, §43(b). The "aggravated" form of stalking carries the additional element that the stalking occur in violation of the terms of a court order that the offender "vacate" the victim's home, or have "no contact," or "refrain from abuse." The court orders listed in the stalking statute are the same ones listed in G.L. c. 209A, §7, orders which will have been served on the offender pursuant to G.L. c. 209A, §7. Of course, violation of such court orders is itself a crime, created by G.L. c. 209A, §7, and punishable by a fine or by up to two and one half years in jail. Stalking in violation of a court order thus appears as an "aggravated" form of this misdemeanor too.

No court order is violated by acts which occur before such an order is issued, and it is not necessary to prove that the offender intended to violate the court order to prove this crime; it is only necessary to prove that the offender willingly, maliciously, and repeatedly did the acts which constitute stalking. By the act of stalking, one may commit an

act of abuse ("placing another in fear of imminent serious physical harm") or otherwise violate a "no-contact" or vacate (and stay away) order. It does not appear necessary to prove that the offender had been served with the court order, but it is prudent to show that the offender was served or otherwise knew about the court order because such evidence strengthens the inferences of malice and intent to place the victim in imminent fear, each an element of stalking. A prosecutor may argue that one who stalks may be guilty without knowledge of the court order on a strict liability basis. See Commonwealth v. Miller, 385 Mass. 521, 524-525 (1982) (statutory rape).

Acts of Stalking Committed Before May 18, 1992

It is important to realize that conduct which occurred before the time that stalking became a crime may be used only to put the offender's conduct after criminalization into context. See, e.g., Commonwealth v. Gordon, 407 Mass. 340, 351 (1990) (evidence of acts which occurred before issuance of restraining order may be admissible at trial for violation of that order). The offender must act repeatedly and make the requisite threat after the passage of the statute, regardless of his or her earlier conduct.

Form of Complaint or Indictment

Complaints or indictments should be drawn in the precise wording of the statute. If the acts alleged are covered by the mandatory minimum sentencing provisions of the statute, and the prosecutor wishes to ensure that these sentencing provisions apply, the complaint or indictment should be drawn in two parts, with the second page alleging, in the specific terms of the statute, the relevant aggravating factor (i.e., violation of a court order or previous conviction for stalking).

CONCLUSION

While the Stalking Bill may not be the solution to every case, it will prove to be an important protection or prevention only if it is implemented and not ignored. Do not hesitate to contact your District Attorney's office or the Attorney General's office (Jane Tewksbury, Chief of the Family and Community Crimes Bureau, or Diane Juliar, Director of Policy and Training, (617) 727-2200) with questions, suggestions, or comments based on your experiences with this new statute. Do not be deflected from prosecutions by challenges to the statute which will be addressed one by one in the trial courts, appellate courts, and perhaps in the Legislature.

TEXT OF G.L. c. 265, §43, the "Stalking Bill"

Section 43(a): Whoever willfully, maliciously, and repeatedly follows or harasses another person and who makes a threat with the intent to place that person in imminent fear of death or serious bodily injury shall be guilty of the crime of stalking and shall be punished by imprisonment in the state prison for not more than five years or by a fine of not more than one thousand dollars, or imprisonment in the house of correction for not more than two and one-half years or both.

Section 43(b): Whoever commits the crime of stalking in violation of a temporary or permanent vacate, restraining, or non-contact order or judgment issued pursuant to sections eighteen, thirty-four B, or thirty-four C of chapter two hundred and eight; or section thirty-two of chapter two hundred and nine; or sections three, four, or five of chapter two hundred and nine A; or sections fifteen or twenty of chapter two hundred and nine C; or a temporary restraining order or preliminary or permanent injunction issued by the superior court, shall be punished by imprisonment in a jail or the state prison for not less than one year and not more than five years. No sentence imposed under the provisions of this subsection shall be less than a mandatory minimum term of imprisonment of one year.

A prosecution commenced hereunder shall not be placed on file or continued without a finding, and the sentence imposed upon a person convicted of violating any provision of this subsection shall not be reduced to less than the mandatory minimum term of imprisonment as established herein, nor shall said sentence of imprisonment imposed upon any person be suspended or reduced until such person shall have served said mandatory term of imprisonment.

A person convicted of violating any provision of this subsection shall not, until he shall have served the mandatory minimum term of imprisonment established herein, be eligible for probation, parole, furlough, work release or receive any deduction from his sentence for good conduct under sections one hundred and twenty-nine, one hundred and twenty-nine C and one hundred and twenty-nine D of chapter one hundred and twenty-seven provided, however, that the commissioner of correction may, on the recommendation of the warden, superintendent, or other person in charge of correctional

institution, grant to said offender a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of next of kin or spouse; to visit a critically ill close relative or spouse; or to obtain emergency medical services unavailable at said institution. The provisions of section eighty-seven of chapter two hundred and seventy-six relating to the power of the court to place certain offenders on probation shall not apply to any person seventeen years of age or over charged with a violation of the subsection. The provisions of section thirty-one of chapter two hundred and seventy-nine shall not apply to any person convicted of violating any provision of this subsection.

Section 43(c): Whoever, after having been convicted of the crime of stalking, commits a second or subsequent such crime shall be punished by imprisonment in a jail or the state prison for not less than two years and not more than ten years. No sentence imposed under the provisions of this subsection shall be less than a mandatory minimum term of imprisonment of two years.

A prosecution commenced hereunder shall not be placed on file or continued without a finding, and the sentence imposed upon a person convicted of violating any provision of this subsection shall not be reduced to less than the mandatory minimum term of imprisonment as established herein, nor shall said sentence of imprisonment imposed upon any person be suspended or reduced until such person shall have served said mandatory term of imprisonment.

A person convicted of violating any provision of this subsection shall not, until he shall have served the mandatory minimum term of imprisonment established herein, be eligible for probation, parole, furlough, work release or receive any deduction from his sentence for good conduct under sections one hundred and twenty-nine, one hundred and twenty-nine C and one hundred and twenty-nine D of chapter one hundred and twenty-seven; provided, however, that the commissioner of correction may, on the recommendation of the warden, superintendent, or other person in charge of correctional institution, grant to said offender a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of next of kin or spouse; to visit a critically ill close relative or spouse; or to obtain emergency medical services unavailable at said institution. The provisions of section eighty-seven of chapter two hundred and seventy-six relating to the power of the court to place certain offender on probation shall not apply to any

person seventeen years of age or over charged with a violation of this subsection. The provisions of section thirty-one of chapter two hundred and seventy-nine shall not apply to any person convicted of violating any provision of this section.

Section 43(d): For the purposes of this section, "harasses" means a knowing and willful pattern of conduct or series of acts over a period of time directed at a specific person, which seriously alarms or annoys the person. Said conduct must be such as would cause a reasonable person to suffer substantial emotional distress.

Effective Date: May 18, 1992

RECENT STATUTORY AMENDMENTS

College and University Police Must Keep Daily Log. G.L. c. 41, §98F, which requires police departments to maintain a daily log of responses to complaints, crimes reported, and persons arrested and the charges against such persons, was amended to include within its reporting requirements each college or university to which police officers have been appointed pursuant to G.L. c. 147, §10G. The statute also provides that, unless otherwise provided in law, the logs are public records available to anyone without charge.

Doctors and Hospitals Must Report Sexual Assaults to Commissioner of Public Safety and Local Police. G.L. c. 112, §12A1/2, was added to require that physicians and hospitals who treat rape or sexual assault victims are required to report such cases to the commissioner of public safety and the police of the town where the rape or sexual assault occurred. The statute further provides that the physician or hospital shall describe the general area where the attack occurred, but shall not include the victim's name, address, or any other identifying information.

Four New Substances Within Class B Narcotics. G.L. c. 94C, §31, was amended to include four additional substances to those included within Class B controlled substances:

1) Phenyl-2-Propanone (P2P);
2) Phenylcyclohexylamine (PCH);
3) Piperidinocyclohexanecarbonitrile (PCC); and
4) 3,4-methylenedioxy methamphetamine (MDMA).

Fine For Destruction of Playground Equipment Increased. G.L. c. 266, §98A, was amended to increase the potential fine for destruction of park or playground equipment from one hundred dollars ($100) to one thousand dollars ($1,000).

Increased Penalties for Leaving the Scene of An Accident. G.L. c. 90, §24, was amended to increase the penalties for leaving the scene of an accident after causing personal injury. The statute as amended provides for a penalty of not less than six months nor more than two years and a fine of not less than five hundred dollars nor more than one thousand dollars for leaving the scene after causing personal injury not resulting in death. G.L. c. 90, §24(2)(a 1/2)(1).

The penalty for leaving the scene after causing personal injury which results in death is not less than 2 1/2 years nor more than 10 years in state prison and a fine of not less than one thousand dollars nor more than five thousand dollars, or

imprisonment in a house of correction for not less than one year nor more than two and one-half years and a fine of not less than one thousand dollars nor more than five thousand dollars. Persons convicted under this section are not eligible for probation, parole, or furlough, and cannot receive any deduction from their sentence, until they have served at least one year.

The statute further provides mandatory minimum periods during which a person's license to operate a motor vehicle is to be revoked following conviction under this section.

Procedure for Juvenile Transfer Hearings Amended. G.L. c. 119, §60, et seq., which establishes the procedure for juvenile transfer hearings, was amended in several respects.

SECTION 1 amends G.L. c. 119, §60, to allow the use of prior adjudications of delinquency for impeachment purposes in subsequent delinquency or criminal proceedings in the same manner and to the same extent that prior criminal convictions can be used. (This does not include use of adjudications based on violations of local by-laws or ordinances.) It also rewords the provision regarding other use of evidence, adjudications and dispositions from juvenile proceedings, and appears to delete the provision allowing general use of the records in subsequent delinquency proceedings, reducing its application to bail determinations in subsequent delinquency or criminal proceedings and in the imposition of sentence in subsequent criminal proceedings only.

SECTION 2 amends the second paragraph of G.L. c. 119, §61, to require that a transfer hearing be held in all cases involving murder in the first or second degree, manslaughter, rape, kidnapping, armed assault with intent to rob or murder, forcible rape of a child, and armed burglary [underlined offenses were added]. Armed robbery which results in serious bodily injury, present in the prior statute, has been deleted.

SECTION 3 amends G.L. c. 119, §61, by requiring that, if the offense charged is one of the eight crimes where a transfer hearing is mandated, then the probable cause (Part A) portion of the hearing shall be held within 15 days of the child's first appearance before the court after the complaint has been brought. If probable cause is found for one of those offenses, the Part B or dangerousness and amenability portion of the transfer hearing shall be held within 30 days of Part A. Failure to meet these time standards does not bar a hearing at a later date as determined by the court. These time standards are not applicable to any offenses other than the eight crimes specifically designated.

A new paragraph has been inserted allowing the Commonwealth to proceed by filing a complaint or an indictment in juvenile

court or in a juvenile session of district court in cases where the offense alleged is murder in the first or second degree. If the Commonwealth chooses to proceed by indictment, then no probable cause (Part A) hearing shall be held and the next step in the process is the Part B hearing.

The juvenile is also given the right to proceed by indictment, i.e., the Commonwealth must indict after the Part B hearing if it has not done so before, presumably because the juvenile faces a mandatory sentence which will include imprisonment in state prison, as described below. See also SECTION 10, which amends G.L. c. 263, §4, to give a juvenile charged in juvenile court or a juvenile session of district court with first or second degree murder the right to be proceeded against by indictment.

SECTIONS 4 and 5 amend the fifth and sixth paragraphs of §61 to provide that if the court decides not to transfer a juvenile, the court shall state its reasons in writing and the Commonwealth may appeal the decision within 10 days to the Appeals Court pursuant to G.L. c. 278, §28E. If the time for appeal expires, then the court proceeds on the delinquency complaint (or, presumably, the indictment in a murder case, if one was obtained by the prosecutor, although the statute only refers to complaints). See also SECTIONS 11 and 12, which amend G.L. c. 278, §28E, regarding appeals by the commonwealth, to be consistent with Sections 4 and 5.

SECTION 6 amends the sixth paragraph of G.L. c. 119, §61, by expanding the category of offenses which carry with them a rebuttable presumption that the child is not amenable to rehabilitation and is a danger to the public to include, along with first and second degree murder, manslaughter, armed assault with intent to rob or murder, rape, forcible rape of a child, and armed burglary.

SECTION 7 amends G.L. c. 119, §72, to make clear that the courts retain jurisdiction in their juvenile sessions until the juvenile reaches age 19 while the transfer hearing is pending.

In addition, a sentence is added to the first paragraph of §72 which states that if a child is charged with first or second degree murder, manslaughter, rape, forcible rape of a child, or kidnapping (armed burglary and armed assault with intent to rob or murder are not included), and the offense was committed prior to the child's 17th birthday but the child is not apprehended until after his 18th birthday, then the court shall immediately conduct a transfer hearing pursuant to §61.

The last sentence of the existing second paragraph is omitted which provides that a child who has been adjudicated delinquent by reason of murder in the first or second degree shall not be committed beyond age 21. This language is still present in §58.

In the case of first degree murder, a child shall be committed to a maximum confinement of 20 years. The mandatory minimum incarceration period is 15 years, and the child is not eligible for parole before such time has been served. This confinement shall be in a secure facility of DYS until age 21, and thereafter the offender shall be transferred to the custody of the Department of Correction.

If the offense is murder in the second degree, the child shall be committed to a maximum confinement of 15 years. The mandatory minimum incarceration shall be for 10 years, and until such time has been served, the offender shall not be eligible for parole. After reaching age 21, the offender shall be transferred into the custody of the Department of Correction.

If the adjudication is for manslaughter, the child shall be committed to the custody of DYS until he reaches age 21.

SECTION 8 amends the first paragraph of subsection (a) of G.L. c. 120, to give the commissioner of DYS the authority to transfer a person who has attained his 18th birthday into the custody of the Department of Correction if such person was adjudicated delinquent for first or second degree murder and the Commissioner of DOC concurs with the transfer instead of waiting until age 21.

SECTION 9 amends G.L. c. 218, §27, regarding the imposition of penalties for the district courts. The statute currently states that the district courts may not impose a sentence to the state prison. The new language attempts to create an exception whereby a juvenile court or the juvenile session of the district court would have the power to commit a child adjudicated delinquent for first or second degree murder to the Department of Youth Services until the age of 21 and thereafter to state prison for a mandatory minimum term of years.

RECENT CASES

I. SEARCH AND SEIZURE

A. Searches Pursuant To Warrant.

Announcing identity after using ruse to get door opened does not violate knock and announce rule. Commonwealth v. Goggins, 412 Mass. 200 (1992). The police obtained a warrant to search the defendants' apartment, which did not authorize a "no knock" entry. Using a ruse (knocking and indicating they were from Pop Warner football), the police got one of the defendants to open the door. Upon seeing the officers, the defendant who had answered the door attempted to close it, but an officer put his hand across the threshold and prevented the door from being closed. The officers then identified themselves and their purpose, and entered and searched the apartment, seizing drugs, drug paraphernalia, and cash.

The Court held that the knock and announce rule was not violated in this case. The use of a ruse to get the defendants to open the door satisfied the reasons behind the knock and announce rule (to decrease the potential for violence, protect privacy, and prevent the unnecessary damage to homes) since, once the defendant opened the door, the identity of the police was immediately obvious. The fact that an officer held the door open did not constitute an improper entry, because the police did not force entry into the apartment until they had properly identified themselves and announced their purpose.

Information in affidavit sufficient to establish informant's reliability and supported "no knock" warrant. Commonwealth v. Mendez, 32 Mass. App. Ct. 928 (1992). The affidavit in support of the search warrant in this case relied upon information from a confidential informant. The affidavit indicated that the informant had provided information in a previous case which led to an arrest and seizure of narcotics, and that in that prior case the informant had observed narcotics in the home prior to the search. The Appeals Court construed this information to mean that sometime in the past the informant had observed cocaine and heroin in a particular apartment, notified the police, who, as a result of the informant's observations, seized narcotics and money. Therefore, the accuracy of the informant's prior tip was established.

The Court further held that the no knock warrant was justified. The affidavit stated that the cocaine was kept in the bathroom under the sink, and therefore could easily be disposed of if the occupants were alerted by a knock and announcement by the police. The Court noted that while this,

alone, would not be enough to support a no knock warrant, the affidavit contained information that all doors to the building were kept locked, and on a prior visit to the location the police saw several people near the building run into a rear entrance when the police pulled into the parking lot, suggesting that they were acting as a lookout for the police.

B. Warrantless Searches.

Search of car following arrest for kidnapping not proper. Commonwealth v. Cassidy, 32 Mass. App. Ct. 160 (1992). A police officer on routine patrol noticed a car parked in a "no trespassing" area. An hour later, he saw the car parked in another "no trespassing" area, and stopped the car. A young boy was in the car with the defendant, and the officer determined that the boy had been kidnapped. The defendant was removed from the car and arrested. The police searched the car, and found a pipe for smoking marijuana in a closed paper bag. The defendant was convicted of possession of marijuana.

The Court held that the search of the closed paper bag was not justified as a search incident to an arrest, since such a search may be made only for the purpose of seizing evidence of the crime for which the arrest was made. There was no connection between the contents of the paper bag and the kidnapping, particularly where the police had no information that the defendant had used a weapon which might have been concealed in the bag. The search also was not a proper protective search under Terry, or pursuant to G.L. c. 276, §1, to remove weapons that an arrestee might use, since the defendant had been arrested, handcuffed, and moved to a cruiser before the search began.

Probable cause and exigent circumstances justified search of car. Commonwealth v. Bakoian, 412 Mass. 295 (1992). On a February afternoon at 3:00 p.m., a Lynn detective received the following tip from an unnamed informant: Alfred Bakoian and John Walsh were en route from Rhode Island to Bakoian's Lynn apartment with a shipment of heroin and they were scheduled to arrive "soon." Bakoian and Walsh would be traveling in a black Thunderbird with a beige roof, bearing a Massachusetts registration of 420-TCZ. The detective had arrested Bakoian at Logan Airport in the past for heroin offenses and knew his residence to be Surfside Road in Lynn. The detective set up a surveillance on route between Road Island and Lynn, at 4:00 p.m., he saw the described automobile and recognized its occupants to be Bakoian and Walsh. When the car arrived at 20 Surfside Road, a surveillance team detained the suspects in the

building's parking lot and retrieved a quantity of heroin from the car's air filter under the hood which had been left "ajar."

The Court held that there was probable cause and exigent circumstances to justify the warrantless search of the car. The informant's tip was sufficiently reliable because the informant's identity was known to the police, and the tip provided specific, detailed information that revealed the exact identities of the persons in the car, their exact destination, and the approximate time they would arrive at that location. These facts could not have been obtained by an uninformed bystander, and instead demonstrated inside information and personal knowledge of Bakoian's affairs. Once the police were able to corroborate the details of the tip, they had probable cause to search the entire car, its contents and areas that were capable of concealing the heroin.

Factors which established exigent circumstances included: the location of the vehicle in an unattended parking lot adjacent to a main road; the hood being "ajar" or unlocked; impending darkness (4:00 p.m. in February); the likelihood that the heroin would be removed or destroyed; and the time and police power needed to arrest and transport Walsh and Bakoian to the police station. Because the entire investigation (leading to probable cause) lasted only an hour, the police did not have an ample opportunity to obtain a search warrant. The police were not required to post a guard at the car and seek a search warrant in a nearby district court.

Limitation on defendant's cross-examination of officer concerning informant's basis of knowlege proper. Commonwealth v. Bakoian, 412 Mass. 295 (1992). The Appeals Court held that the trial judge properly limited the defendant's cross-examination of the officer concerning exactly what the informant stated about his or her basis of knowledge, since that would effectively disclose the informant's identity. The defendant was permitted to fully cross-examine the officer concerning his direct testimony, which did not include any specific information about the informant's basis of knowledge.

Officer properly seized evidence from defense counsel taken from home prior to obtaining search warrant. Commonwealth v. Martino, 412 Mass. 267 (1992). After the defendant was arrested for first degree murder, an officer was posted at his home for security purposes prior to obtaining a search warrant. Defense counsel was permitted to enter the home for the sole purpose of looking around, and emerged from the house with a videotape and a copy of a restraining order. The officer seized both items and would not allow the attorney to replace the items in the house. The officer knew that one of

the items the police would look for once the search warrant issued was a videotape and so it was reasonable for him to believe that the videotape taken by defense counsel might be material evidence. Given the potential for loss or destruction of the evidence if it was removed from the house, an exigent circumstance was created and the officer acted reasonably when he seized the evidence. If the officer had allowed the attorney to replace the items there was a risk of loss. In addition, if the officer accompanied the attorney into the house there was the chance that he would see evidence in plain view which, if seized, might have resulted in a challenge to the admissibility of the evidence. Therefore, the officer acted appropriately in the circumstances.

Misstatement in search warrant affidavit did not justify Franks hearing. Commonwealth v. Martino, 412 Mass. 267 (1992). A State Trooper viewed the videotape seized from defense counsel, and included in his affidavit for the search warrant that the videotape had been partially erased. The officer watched the tape without the audio portion engaged, and when he came to a blank spot within the otherwise full tape, he reasonably presumed that there had been an erasure. The fact that the blank portion was a recorded telephone call would not have been apparent to the trooper as the audio was not engaged. The trooper's misstatement was therefore unintentional, and the defendant was not entitled to a Franks hearing. Similarly, the integrity of the grand jury was not compromised by the misstatement regarding the erasure of the videotape since it was not intentionally or recklessly made.

Police stopping suspected stolen car by encircling with cruisers was not reasonable. Commonwealth v. Stawarz, 32 Mass. App. Ct. 211 (1992). Two officers on patrol were informed that a late 1970's model blue Ford LTD was stolen from a particular neighborhood. Approximately an hour later, the officers saw a car fitting the general description of the stolen vehicle about one and a half miles from where the theft occurred. The driver and occupant were looking around, acting suspiciously. Several marked cruisers converged upon the car, and blocked it from all sides. As officers approached the car, one saw through the window that the ignition was missing and the steering column was damaged. The defendants were ordered out of the car, patted down, and the car was searched.

The Court held that although the police had reasonable suspicion to conduct a Terry stop, the degree of force used was unreasonable considering the crime under investigation; the abrupt stop and encircling of the car amounted to an arrest, for which there was not probable cause. Moreover, the police

did not have sufficient information prior to the stop to justify it on the ground that they were acting to protect their safety.

Initial encounter at airport not seizure. Commonwealth v. Moore, 32 Mass. App. Ct. 924 (1992). A State Trooper approached the defendant at Logan Airport and asked him to identify himself and show his driver's license. The trooper also told the defendant he was free not to talk to the trooper. During the conversation, the defendant asked the trooper if he thought he was a drug dealer and lowered his pants exposing his genital area to allow the trooper to check the area for drugs. Although the trooper declined the defendant's invitation to search his genitals, the trooper did ask if he could pat frisk the defendant's ankles, to which the defendant replied, "sure go ahead." While conducting the pat frisk, the trooper felt a bulge around the defendant's ankle. When the trooper asked the defendant what it was, the defendant replied, "none of your business" and shoved the trooper. The defendant was arrested and a subsequent search revealed that he had cocaine taped to his ankles.

The Appeals Court held that because the trooper was alone, displayed no weapon, did not act in a coercive manner, and told the defendant he was free to leave at any time, the initial exchange between the trooper and the defendant was not a stop or seizure within the meaning of the Fourth Amendment. Moreover, the defendant's actions, together with the trooper feeling a bulge around the defendant's ankles, provided the trooper with probable cause to believe that the defendant was engaged in the crime of trafficking in cocaine. The arrest and subsequent search were therefore legal.

Warrantless entry into home proper where probable cause and exigent circumstances existed, and entry was consensual. Commonwealth v. Viriyahiranpaiboon, 412 Mass. 224 (1992). The defendant ambushed and stabbed a woman and her husband outside a restaurant. At the scene, the male victim, who saw the defendant stab the woman, identified the defendant by name to the police. Another employee told the police where the defendant lived. While responding to the scene, an officer saw the defendant's car approximately one and a half blocks from the scene. Officers later went to the defendant's apartment, and the defendant invited them in. While inside, the police saw in plain view two knives and a pair of bloodstained pants. The police seized the knives and pants, and arrested the defendant.

The Court held that the police were justified in entering the defendant's home before getting an arrest or search

warrant, since there was strong probable cause to believe the defendant was the attacker, the crimes were violent, the defendant could reasonably be expected to be armed, the police knew the defendant was in the dwelling, and the entry was peaceable. Moreover, since the entry was consensual, no showing of exigency was required. Since the officers were lawfully on the premises, they were entitled to seize the knives and bloodstained pants.

Investigation by trooper of parked car proper based on reasonable suspicion. Commonwealth v. Doulette, 32 Mass. App. Ct. 506 (1992). While on routine patrol at night, a police officer entered a parking lot where in the past he had made numerous arrests for unlawful activity. He noticed two unattended cars and saw an interior light flick on and off in the third car (the defendant's). The trooper shined his spotlight on the defendant's car and saw the defendant looking straight ahead and talking out of the side of his mouth to the passenger, who bent over as if to pick something up while staring straight at the cruiser. The officer approached the defendant's car, and saw the passenger looking down in front of him. The trooper then saw protruding from beneath the passenger seat a mirror with white powder on it, a razor blade, and a one- by one-inch paper wrapper.

The Appeals Court held that the trooper's approach of the vehicle was justified as a routine inquiry pursuant to Terry. The officer was attempting to carry out an on-the-scene investigation in a public area of persons whose presence, in his experience, was out of the ordinary. The defendant and passenger's furtive gestures gave the officer additional cause to confirm his suspicion that unlawful activity was going on. Therefore, the officer had reasonable suspicion to approach the car, and once near the car, saw the drugs and paraphernalia in plain view.

Warrantless search following negotiation of drug deal not justified. Commonwealth v. Wigfall, 32 Mass. App. Ct. 582 (1992). In connection with an investigation of drug distribution in Lynn, a State Trooper recruited a confidential informant, "Blue", to assist in ferreting out drug dealers. Blue's involvement with the investigation did not lead to any arrest, nor did she participate in any controlled buys prior to the events at issue here. Blue told the trooper that the defendant was dealing large amounts of cocaine from his basement apartment. She had visited the apartment where she saw cocaine and scales. Around noon, Blue and the trooper, posing as Blue's brother, met the defendant in his apartment and discussed the trooper's purchase of cocaine. The defendant

left the room to make a telephone call, then said that his connection was only five minutes away, so they could consummate the deal in fifteen minutes. The trooper said he needed time to raise the money, and gave the defendant a pager number so they could keep in touch.

The defendant beeped the trooper at approximately 1:00 p.m. and told him that things were all set at his end and ready to go. The defendant continued to beep the trooper every half hour, and the trooper, who was gathering officers, fabricated reasons for the delay. Approximately four hours after the initial meeting, the trooper, along with approximately eleven other officers, met near the defendant's apartment. The trooper alone went into the apartment, examined the drugs, then returned to his car with the defendant to retrieve the money. The trooper gave a prearranged signal, and the other officers arrested the defendant and staged a mock arrest of the trooper. They then forced open the door of the apartment, arrested the three individuals inside, and seized cocaine that was in plain view on a table. The trial judge allowed the defendant's motion to suppress the drugs, and the Commonwealth appealed.

The Commonwealth argued that the officers did not acquire probable cause to search or arrest until 3:30 p.m., when the defendant beeped the trooper and said that "everything is here waiting for you." The Court held that there was probable cause for a magistrate to issue a warrant to arrest the defendant inside his apartment at 1:00 p.m. The Court stated that the trooper's face-to-face negotiations with the defendant established probable cause to believe he was currently engaged in drug distribution. That, combined with the informant's information concerning the cocaine and scale, the defendant's desire to wrap up the deal quickly, the close proximity of the defendant's source to his apartment, the impression that the trooper would return at 1:00 p.m., the confirmation call at 1:00 that everything was set, and the fact that no other place was mentioned as a location where the deal would occur, was more than adequate to establish probable cause to arrest the defendant in his apartment at 1:00. Therefore, the police had sufficient information and time to obtain an arrest warrant prior to 4:00.

Note: The Commonwealth is seeking further appellate review by the Supreme Judicial Court of this decision.

Warrantless search of store basement following drug transaction proper. Commonwealth v. Lee, 32 Mass. App. Ct. 85 (1992). Two undercover officers negotiated with the defendant's son to buy cocaine. The defendant's son said he would have to talk to his father, made a call, then drove with the officers to the

defendant's supermarket. One officer and the defendant's son went inside. The son approached the defendant and engaged in a whispered conversation. The defendant's son and the officer then went to the basement through a door marked "employees only." They discussed the drug transaction, the officer gave the defendant's son a $200 advance, then the officer returned to the car. The defendant's son returned to the car and told the group they would have to wait elsewhere for word that the drugs were ready. They drove to the defendant's sons apartment, and later returned to the supermarket. The officer and the defendant's son went to the basement. An employee of the defendant handed the defendant's son a bag containing cocaine, and the officer handed over $4,500. The officer and the defendant's son returned to the car and drove off, and were stopped by a police surveillance team and arrested. Another officer entered the basement and found the defendant and employee counting the money, and arrested them.

The Appeals Court concluded that exigent circumstances existed to justify the warrantless entry by police. Until the officer emerged from the store with the drugs, the arrangement remained tentative, particularly as to where and when the sale would take place. It would have been impracticable, therefore, for the officers to obtain a warrant. Before the police entered the basement, they had probable cause to arrest the defendant and strong reason to believe that the evidence would be found in the basement. In addition, the entry was peaceable and made during daytime hours. Further, although it did not appear that the defendant was aware of the investigation, the marked money may have been quickly circulated throughout the supermarket, and there was a likelihood that the defendant would soon realize that the police were on his trail and that the money might be marked. It was reasonable for the police to believe that some of the money would leave the supermarket before a warrant could be obtained. In addition, the Court reasoned that because the basement of the supermarket was not a dwelling and was open to employees, there was a reduced expectation of privacy in the area.

Police properly entered hotel room in attempt to execute arrest warrant and seized contraband in plain view. Commonwealth v. Brown, 32 Mass. App. Ct. 649 (1992). While reviewing guest registration cards at a hotel, a special security officer noticed that a Kenneth Blakely had booked room 225. The officer recognized the name, checked a book which catalouged outstanding Boston police arrest warrants, and found that there was an outstanding warrant for Blakely's arrest, with the same address as appeared on the motel registration card. Five uniformed police officers went to room 225 at 2:45 a.m. An

officer knocked on the door, which was opened by one of three occupants. Another officer asked if Blakely was there and whether the officers could enter. The person who answered the door said Blakely was not there, then stepped back and said, "Sure come on in," gesturing with a sweeping motion of his hand and arm. The defendant was sitting on the bed next to a ball of aluminum foil with some plastic protruding from its surface. During the discussion with the occupants, an officer standing near a desk noticed inside a slightly opened drawer what he believed to be two partially smoked marijuana roaches in an ashtray. He opened the drawer further and saw a quantity of white granulated powder lying on a piece of newspaper. The ball of aluminum foil was opened and contained what the officers believed to be cocaine. The defendant was convicted of trafficking in cocaine.

The Court noted that the defendant had standing to challenge the entry into the hotel room and the seizure of the drugs since he was charged with a possessory crime. The Court held that the officer's entry into the room and initial inquiry were justified since they were in the process of executing a valid arrest warrant. Moreover, the Court found that, although ambiguous actions do not establish consent, in this case the occupants consented to the entry, since there was a clear invitation to enter. Finally, the seized items were in plain view, and therefore were properly seized.

Observation of package in open area behind loose wall panel in car justified by inventory policy or plain view doctrine, and seizure justified based on probable cause and exigent circumstances. Commonwealth v. Figueroa, 412 Mass. 745 (1992). The police stopped a car for speeding in which the defendant was a passenger. The police conducted a records check, and discovered that there were four warrants outstanding for the driver's arrest. The police then arrested the driver, and had the defendant step out of the vehicle so they could conduct an inventory search and tow the vehicle. From outside the vehicle, an officer saw that an interior wall panel to the rear of the driver's seat was detached from the wall. With the aid of his flashlight, the officer saw a brown paper bag wrapped in a clear plastic bag in the open area. Based on his training and experience, including a prior instance where he discovered illegal drugs in a similar location, the officer became suspicious that the package contained drugs. He called to another officer to observe the package. While the second officer looked at the package, the defendant fled. The officer conducting the search abandoned his inventory search, seized the package, and chased the defendant.

The Court held that the written inventory policy, which expressly provided that the search should encompass all open areas, certainly covered the area behind the wall panel. Moreover, even if the area were not expressly encompassed by the policy, the officers' observation of the package was justified under the plain view doctrine. The Court also held that the seizure of the package was proper because, although the trooper had abandoned the inventory search when he chased the defendant, the seizure was justified based on probable cause and exigent circumstances. Based on his previous experience, the trooper knew from the nature of the package and its place of concealment that the package contained contraband. Moreover, after he became suspicious and asked the other trooper to look at the package, the defendant fled. The trooper was faced with exigent circumstances which justified the seizure when he had to chase the defendant and leave the car unattended.

II. NARCOTICS OFFENSES.

A. Disclosure Of Surveillance Location.

Removing defendants from courtroom while officer testified as to surveillance location not proper. Commonwealth v. Rios, 412 Mass. 208 (1992). The defendants were charged with cocaine trafficking. During trial, an officer testified that he conducted surveillance from a "secure location." On cross-examination, defense counsel asked the officer for the exact location of the surveillance, and the prosecutor objected, arguing that the police had an interest in using the location in the future. The trial judge ruled, after a voir dire outside the defendants' presence and a view of the scene without counsel, that the surveillance location point would not be disclosed to the public, but that the defendants' attorneys would be permitted to cross-examine the officer, outside the presence of the defendants, concerning the surveillance point and what he did there. After that testimony, the defendants were brought into the courtroom and cross-examination of the officer on other topics continued.

The Supreme Judicial Court ruled that the procedure used violated the defendants' constitutional right to be present during cross-examination, and could not be justified by the Commonwealth's interest in the confidentiality of the surveillance site. The Court noted that there may be circumstances in which the Commonwealth may keep a surveillance sight secret during trial without violating the defendant's rights to confrontation and a fair trial. However, the correct procedure in such a case would be total non-disclosure of the

location during trial, not removal of the defendants from the courtroom during cross-examination on the issue.

B. Procuring Agent Instruction.

Defendant was not entitled to "procuring agent" instruction when he was charged with trafficking and expected to profit from the deal. Commonwealth v. Murillo, 32 Mass. App. Ct. 379 (1992). The defendant, who had had prior drug dealings with a police informer, took the informer to a hotel where a third person had five kilograms of cocaine. The drugs were put in a suitcase, and the defendant carried them to the informer's car. The defendant and informer left for the defendant's hotel, where they were to await payment. The defendant expected to be paid $5,000 and some cocaine for his efforts in connection with the deal. The defendant was then arrested, and convicted of trafficking in excess of 200 grams.

The defendant challenged the trial judge's refusal to give a so-called "procuring agent instruction," which instructs the jury to find the defendant not guilty if they believe he was acting solely as an agent of the buyer. The Appeals Court noted that a "procuring agent" instruction may be appropriate where the defendant is charged under a statute prohibiting the sale of narcotics, since, under such a statute, buyers are either not criminally liable or are subjected to lesser penalties. However, the present drug statute, under which the defendant was convicted, reaches beyond sellers; not only the buyer but anyone else participating in the transaction can be convicted if they acted knowingly and with the intent that the cocaine be distributed. The Court further noted that such an instruction has never been given when the defendant, as in this case, expected to profit from the deal.

C. Evidence Of Possession.

Evidence sufficient to establish defendant's knowledge of contraband found in desk and file cabinet in gas station managed by defendant. Commonwealth v. Bonilla, 32 Mass. App. Ct. 942 (1992). The police went to a gas station to execute a search warrant. The defendant was seated at a desk in the employee area, wearing a shirt embroidered with the station's logo and the word "Manager." The defendant stated that he was the manager. In the desk at which the defendant was sitting the police found a bottle of lactose, sandwich bags, a loaded gun with an obliterated serial number and ammunition, along with personal papers belonging to the defendant. In a filing cabinet, an officer pulled out a box of perfume, which the defendant said was for his girlfriend. Under the box, the

officer could see a bag of cocaine, and found twenty-one additional bags. The defendant was found guilty of trafficking in cocaine, and possessing a firearm and ammunition.

The presence of the defendant in the area, coupled with the proximity of his personal property to the contraband and weapons, and the fact that the cocaine was in plain view from the position in which the personal property was found, provided a sufficient basis for the judge to infer that the defendant knew of the contraband. Moreover, the fact that the defendant was the "manager" of the station and had keys to the station suggested that he had dominion and control over the contraband and an ability and intention to exercise that control. Therefore, the defendant was at least in constructive possession of the contraband.

D. Certificate of Analysis.

Certificate of analysis with facsimile of notary public's signature sufficient. Commonwealth v. Johnson, 32 Mass. App. Ct. 355 (1992). The defendant was convicted of trafficking in over 28 grams of cocaine. He claimed that the certificate of analysis from the chemist of the Department of Public Health was not admissible because the signature of the notary public on it was a stamped facsimile rather than handwritten. The Appeals Court held that although a handwritten signature is the better practice, a facsimile signature is sufficient under G.L. c. 111, §13, which requires only that the analyst swear to the contents of the certificate before a notary public.

III. ADMISSIONS AND CONFESSIONS

A. Waiver Of Miranda.

Questioning at police station prior to and following Miranda warnings proper. Commonwealth v. Azar, 32 Mass. App. Ct. 290 (1992). The police went to the defendant's home the day after his infant daughter was found dead in her bedroom. The police did not suspect at that time that the defendant had killed his daughter. The police began to have a conversation with the defendant at his home, but were continually interrupted, so they asked the defendant to return to the police station so they could talk without interruption. The defendant agreed to go, and drove to the station with his father. Before they began questioning him, the police told the defendant he was not under arrest or in custody and was free to go at any time. In the middle of the interview at the station, the defendant's father told the defendant that an attorney was on the way; the police then read the defendant his Miranda rights, and he

continued talking. At the end of the interview, the defendant was allowed to leave with his father and was not arrested until the next day, because the police did not believe they had probable cause to arrest him when he left the station.

The Appeals Court ruled that, although the investigation may have begun to focus on the defendant, this did not mean he was in custody, since he voluntarily went to the police station, allowed his father to accompany him, was explicitly told that he was free to go at any time, was questioned in a nonthreatening manner, and was in fact allowed to leave the station after the interview.

Minor had opportunity for meaningful consultation with adult where he and mother were informed of right to confer, and declined. Commonwealth v. Ward, 412 Mass. 395 (1992). A police officer read Miranda warnings to the 16 year old defendant and his mother. The defendant and his mother then read those rights, and indicated that they understood them. Each then signed a Miranda card. The defendant's mother said she thought the defendant understood the rights. The officer asked the mother if she wanted to discuss the defendant's rights with him. She looked at the defendant, who indicated that it was "okay." The defendant then gave two incriminating statements while his mother was present. The defendant claimed that his statements should have been suppressed because he did not have a meaningful opportunity to confer with his mother before waiving his Miranda rights.

The Supreme Judicial Court held that a minor's opportunity to have a meaningful consultation with an interested adult does not necessarily require that the police expressly inform the minor defendant and adult that they may consult in private. The police may not deny them the right to confer, particularly if the defendant or the adult indicates that they wish to discuss the matter in private. However, it was sufficient in this case that the police informed the defendant and his mother of the right to confer, and they decided no consultation was necessary.

B. Hearing On Motion To Suppress.

At retrial, not entitled to rehearing on voluntariness of confession. Commonwealth v. Parker, 412 Mass. 353 (1992). The defendant voluntarily accompanied the police to the station, indicated that he understood his Miranda rights, confessed to killing the victim, and repeated that confession on videotape. The issue of the voluntariness of the defendant's confession was raised in a motion to suppress which was denied before the defendant's first trial. The conviction was reversed on appeal

for reasons other than the voluntariness of the defendant's confession. Prior to his second trial, the defendant filed a new motion to suppress, which raised the same issues presented in his motion filed in the first trial. The defendant also filed a motion to amend his motion to suppress, asserting that his statements were involuntary due to mental illness. The judge in the second trial refused to conduct a hearing, and denied both motions.

The Supreme Judicial Court held that the second trial judge properly refused to conduct a hearing on the motion to suppress, since the defendant failed to raise any new issues which were not raised in his first motion, and the law had not changed. Although the defendant did attempt in his motion to amend to add an issue which had not been considered in the first trial, that motion was properly denied because it was not supported by an affidavit as required by Rule 13(a)(2) of the Rules of Criminal Procedure. The Sureme Judicial Court also held that the trial judge properly refused to hold a pre-trial hearing on the voluntariness of the defendant's statements, since the issue had been resolved during the hearing at the first trial. Moreover, the issue of mental illness was heard fully by the jury, and the judge properly instructed the jury to consider whether or not the confession was voluntary.

C. Violation Of Miranda.

Defendant's statements suppressed where desire to remain silent was not scrupulously honored. Commonwealth v. Boncore, 412 Mass. 1013 (1992). Aside from some background questions, the defendant was unresponsive or said "no comment" to questioning by police following his arrest. He telephoned his father and asked him to locate the defendant's brother, who is an attorney. The police thereafter initiated an interrogation of the defendant. The Supreme Judicial Court concluded that the defendant had indicated his desire to remain silent, that the request was not scrupulously honored, and that the motion judge therefore properly suppressed the defendant's statements.

Statements following violation of Miranda must follow break in stream of events and cannot be based on belief that cat is out of the bag. Commonwealth v. Smith, 412 Mass. 823 (1992). The defendant was convicted of two counts of murder in the first degree. The defendant and the victim's son were acquaintances who agreed on a plan to kill the victims and make it look like a robbery. Following the shootings, the victim's son was asked to come to the police station to give a statement. He initially gave an alibi, then admitted to participating in the shootings, but asserted that the defendant had actually fired the shots.

Police officers called the defendant at his residence at the time the victim's son named him as an alibi witness, and he agreed to accept a ride to the station. After completing questioning of the victim's son, the police began interrogating the defendant. They did not inform the defendant of his Miranda rights or of his right to use the telephone. The defendant began by giving an alibi consistent with the alibi originally given by the victim's son. The officer then advised the defendant of his Miranda rights, the defendant signed a waiver, and told the officers that he was willing to talk to them. The officer told the defendant that the victim's son had implicated him in the murders. The defendant then repudiated his alibi and admitted that he was on the victim's property at the time of the shootings, but stated that the victim's son had fired the shots. His statements were admitted at trial.

The Supreme Judicial Court held that an admission of guilt obtained in violation of Miranda (here, the failure to administer Miranda warnings from the beginning of the interrogation, as required by Federal law) is presumed to taint any subsequent confession, and the taint can not be dissipated solely by giving Miranda warnings prior to the later confession. To determine whether the later confession is admissible, the court must look for a "break in the stream of events," indicating that circumstances no longer coerce the defendant, or find that the second statement is not merely the product of the erroneous impression that the cat was already out of the bag as a result of the first statement.

The judge in this case found that the defendant was not coerced or pressured into making his statements. However, there was no evidence before the judge to conclude that a break in the stream of events had occurred--both statements were the result of a single continuous interrogation. Moreover, the Supreme Judicial Court concluded that the defendant's first statement was incriminating, since the victim's son had offered the same alibi before confessing to the crimes. The Court concluded that, given the obvious inculpatory nature of the defendant's first statement, the police were obligated not only to administer Miranda warnings, but to create a break in the stream of events to insulate the later statement from the taint of the prior illegality.

IV. IDENTIFICATION

Where evidence in possession of police which would have played important role in jury's deliberations was not disclosed, new trial ordered. Commonwealth v. Tucceri, 412 Mass. 401 (1992). The defendant was arrested near the scene of a rape within minutes of the crime. He fit the victim's general description

of her attacker, particularly as to his clothing. Another witness reported that someone whom the defendant resembled ran from the scene to the defendant's van. A heel from one of the defendant's boots was found near the scene. The victim and witness both testified that the attacker had no moustache. At a pre-trial hearing on the defendant's motion to suppress the identification, and at trial, the defendant had a moustache, and the defendant's wife testified that at the time of the crime, the defendant had a moustache. The defendant was tried in 1978, and the only issue at trial was identification.

The defendant was photographed when booked. Although prior to trial the defense counsel made a general request for exculpatory evidence, he never specifically requested production of the booking photographs. Ten years after the defendant was convicted, he wrote to the Cambridge police department to obtain these photographs, which pictured him with a moustache. The defendant's motion for new trial based on the prosecution's failure to produce these photographs was allowed.

The Supreme Judicial Court held that, in determining whether to grant a new trial based on the prosecution's failure to turn over exculpatory evidence, the judge must determine whether there is a substantial risk that the jury would have reached a different conclusion if the evidence had been admitted. It is enough that the evidence would have played an important role in the jury's deliberations and conclusions, even though it is not certain that the evidence would have produced a not guilty verdict. The Supreme Judicial Court concluded that the defendant in this case was prejudiced because the jury did not see the booking photograph, since the photo could have been a real factor in the jury's deliberations.

The Supreme Judicial Court reaffirmed that evidence which is possibly exculpatory and in the possession of the investigating department will be treated as if in the possession of the prosecutor for purposes of discovery.

"Show up" conducted several months after crime not unnecessarily suggestive under circumstances. Commonwealth v. Levasseur, 32 Mass. App. Ct. 629 (1992). While walking along the road, the victim accepted a ride from a man driving a pickup truck who repeatedly asked her if she would like a ride. He then raped her and pushed her out the door of the truck. The victim would not speak to the police until a week after the attack. At that time, she gave a description of her assailant, and viewed approximately 6,000 photographs, including a picture of the defendant taken in 1983, but was unable to make an identification.

During the course of the investigation, the defendant agreed to cooperate with the police, and consented to being

photographed. The next day, the victim was shown sixty photographs, including the recent photograph of the defendant. The victim stopped at the defendant's photo and said "That looks like him! That could be him!" She indicated that to be sure, she wanted to see him. On nine separate occasions from July through December, an officer and the victim drove to the vicinity of the defendant's home and workplace. On the last occasion, while sitting in a parked car with the victim, the officer saw a pickup truck approaching. As the truck came closer, the victim said that it looked like the truck. As the truck passed within six feet of the car, the victim began to scream "Its him! Get me out of here right now!" The victim indicated that the driver of the truck was the man in the picture she had selected, and was the man who had raped her.

The Appeals Court noted that, although the officer arranged for the victim to be in a place where he thought the defendant might show up, the procedure was not employed to avoid an identification at a lineup. The fact that the showup did not take place soon after the crime is only one factor to consider in determining whether the identification was unnecessarily suggestive. The Court concluded the the identification in this case was not unnecessarily suggestive, since the victim had ample opportunity at the time of the rape to observe the defendant, requested the showup only after describing her assailant and selecting his photograph from an array, and had never selected a photograph of someone other than the defendant. Her request to see the defendant was based not on uncertainty about the picture she selected, but on an appreciation of the seriousness of what she was doing. Moreover, there was no delay by the police in attempting to accommodate her request to see the defendant in person, and they made no comments to her concerning the man whose picture she had selected. Finally, she did not identify the defendant until she saw the driver of the truck as he passed within six feet of her.

V. SEX CRIMES

A. Elements of Offense.

Defendant who forces victim to engage in sexual activity with third party is guilty of rape. Commonwealth v. Nuby, 32 Mass. App. Ct. 360 (1992). The defendant lived with his girlfriend and her two sons, ages ten and twelve. He physically abused all three, and forced the boys to engage in sexual activity with their mother, and forced the mother to participate in the sexual activity. With threats of physical injury to the mother and her sons, he forced the children to engage in indecent

touching of their mother. On one occasion, while constraining the mother, the defendant forced one of the sons to perform oral intercourse on her. The defendant was convicted of forcible rape of a child and indecent assault and battery on two children under the age of fourteen.

The Appeals Court noted that the essence of the crimes for which the defendant was convicted was "the outrage of compelled sex." The defendant had compelled the victims to perform acts of unnatural sexual intercourse upon a nonconsenting third party and that was sufficient to establish his guilt. A defendant who forces a victim to engage in sexual activity with a third party has committed a rape, whether or not the third party consents to the sexual activity.

B. Fresh Complaint Evidence.

The fact and details of a fresh complaint continue to be admissible in rape cases. Commonwealth v. Licata, 412 Mass. 654 (1992). The Supreme Judicial Court held that, although it has concerns regarding the fresh complaint doctrine, see Commonwealth v. Lavalley, 410 Mass. 641 (1991), it also recognizes the skepticism that exists as to the truth of allegations of rape where the victim is perceived as having remained silent, and therefore the Court continues to perceive a need for the fresh complaint doctrine. Therefore, both the fact and the details of a fresh complaint continue to be admissible in rape cases. See also Commonwealth v. Scanlon, 412 Mass. 664 (1992).

VI. MOTOR VEHICLE OFFENSES

Commonwealth complied with requirement of periodic testing of breathalyzer machines. Morris v. Commonwealth, 412 Mass. 861 (1992). The defendant was arrested and charged with operating a motor vehicle while under the influence of intoxicating liquor. He submitted to a breathalyzer test, which produced a reading of 0.14. In Commonwealth v. Barbeau, 411 Mass. 782 (1992), the Supreme Judicial Court held that, prior to the admission of a breathalyzer result, the Commonwealth must prove compliance with a periodic testing program. In response to that decision, the Secretary of Public Safety established guidelines for a periodic testing program. The defendant in this case argued that the Commonwealth had not complied with the requirements of the periodic testing program and had unlawfully delegated the periodic testing to the police.

The Court held that testing of breathalyzer machines is not unlawfully delegated to the police, since the regulations delegate to the police only the purely ministerial duty of

conducting the tests, which involve no exercise of discretion or judgment, and requiring the police to conduct the tests reasonably satisfies the legislative goal of ensuring the accuracy of the tests. The Court also held that the requirement that the machines be tested every time they are used meets the legislative goal of insuring the accuracy of the machines, rejecting the defendant's claim that the regulations did not meet the requirement of "periodic testing" because they do not require the machines to be tested at "fixed intervals separated by determined periods of time."

Admitting in evidence refusal to submit to breathalyzer test would violate defendant's right against self-incrimination. Opinion of the Justices, 412 Mass. 1201 (1992). The Supreme Judicial Court concluded, in response to a question presented by the Massachusetts Senate, that the provisions of Senate No. 717, which would permit a defendant's failure or refusal to submit to a breathalyzer test to be admissible as evidence in a criminal proceeding, violate the self-incrimination clause of the Massachusetts Constitution.

In 1983, the United States Supreme Court held that admitting into evidence a refusal to submit to a breathalyzer test does not violate the Fifth Amendment to the United States Constitution. South Dakota v. Neville, 459 U.S. 553, 564 (1983). Similarly, a majority of courts which have considered the issue under either the Fifth Amendment or analogous sections of their state constitutions have concluded that the privilege against self-incrimination does not prohibit the introduction into evidence of a defendant's refusal to take a breathalyzer test. Most courts that permit the use of such evidence have reasoned that since a person's breath constitutes real or physical evidence, rather than testimonial evidence, a defendant does not have a constitutional right to refuse to take a test.

The Supreme Judicial Court has held that neither breathalyzer tests nor field sobriety tests are communicative. However, the Court in this case stated that a prosecutor would seek to introduce a defendant's refusal to take a breathalyzer test into evidence as the equivalent of a statement by the defendant that he or she had so much to drink that they knew they would be unable to pass the test. Such a statement by the defendant, if involuntary, would not be admissible, and conduct which by inference expresses such an assertion is similarly inadmissible. Therefore, evidence of a person's thought processes, if offered to show that he or she had doubts about his or her ability to pass the test, would be testimonial, and therefore inadmissible if compelled.

The Supreme Judicial Court concluded that, under the proposed statute, the refusal is compelled because the statute places the defendant in a situation where he or she is compelled to choose between taking the test and possibly producing incriminating real evidence, or refusing the test and having adverse testimonial evidence used against him or her. The Supreme Judicial Court concluded that the proposed statute would violate the state constitution, which provides that no person shall be compelled to "furnish evidence against himself," since the evidence would be compelled and would furnish evidence against the accused.

Complaint based on citation issued fifty-four days after incident was properly dismissed. Commonwealth v. Roviaro, 32 Mass. App. Ct. 956 (1992). An officer responded to the scene of a two-car collision. A witness told the officer that the defendant's vehicle veered into oncoming traffic and collided with the victim's car. The emergency medical technician at the scene told the officer that the victim had lost part of an arm and an elbow. While the defendant was at the hospital, he told the officer that he had consumed five or six beers approximately an hour earlier. The next day, the officer went to the scene to reconstruct the accident, and determined that the defendant was at fault. The day after the accident, the officer delivered a citation to the defendant for operating to endanger.

Fifty four days later, the officer issued a citation for operating a motor vehicle while under the influence of alcohol so as to cause serious bodily injury. The officer testified that the reasons for the delay in issuing the citation were his lack of knowledge of the defendant's blood-alcohol level and nature of the victim's injuries. He testified that he did not know until he received the defendant's medical records on June 28 that the defendant's blood alcohol level was .18, and did not find out until he received a telephone call from the victim's lawyer on July 5, the day before the citation issued, that the victim had suffered serious injuries.

G.L. c. 90, §2 requires the police to issue a citation at the time and place of the violation, but allows certain delays where additional time is necessary to determine the nature of the violation, or for other extenuating circumstances. The Commonwealth bears the burden of establishing that one of the exceptions justified the delay. The Appeals Court concluded that the facts in this case did not support the conclusion that the police reasonably needed fifty-four days to issue the citation, in view of the police department's knowledge of serious bodily injury from the date of the accident (by talking to the emergency medical technician), and the admission from

the defendant at the hospital that he had consumed five or six beers. The Court concluded that waiting eight days after receiving the hospital report (and fifty-four days from the time of the accident) before issuing the citation was a violation of the statute. The Court further noted that the defendant need not show that he was prejudiced by the delay.

VII. MISCELLANEOUS

Police officer entitled to back pay under "Perry Law" for period of suspension during indictment. Madden v. Secretary of Public Safety, 412 Mass. 1010 (1992). A police officer, indicted in state court for larceny and related charges, was suspended from the force pursuant to G.L. c. 30, §59, known as the Perry Law, which authorizes immediate suspension of any public employee indicted for misconduct in office, provided that "if the criminal proceedings ... are terminated without a verdict or finding of guilty on any of the charges on which he was indicted, his suspension shall forthwith be removed, and he shall receive all compensation ... due him for the period of the suspension...." Seven months later, the indictments were nol prossed. Just a few weeks after that a federal grand jury indicted the officer on mail fraud and other charges; he eventually pled guilty to conspiracy to commit mail fraud. When the police department refused the officer's demand for back pay for the period of his initial suspension arising from the state court charges, the officer brought suit for a declaration of his rights under the Perry Law.

The Supreme Judicial Court held that the statute under which the officer was suspended is unambiguous, and since the indictments on which his original suspension was based were dismissed, pursuant to the statute he was entitled to back pay for the period of that suspension.

Two police officers properly convicted of extortion and larceny. Commonwealth v. LaFontane, 32 Mass. App. Ct. 529 (1992). Two police officers entered an apartment during the night, announcing they were police officers, and, with guns drawn, handcuffed Howard and Joseph Taylor and conducted a search of the apartment. They found cocaine, drug paraphernalia, and approximately $4,000 in cash. Officer #1 said to Howard Taylor that he wanted $5,000 from him and $5000 from Joseph. Howard Taylor's sister was allowed to leave the apartment to get the money, and returned with $960. Officer #1 took the money and told Joseph Taylor that $5000 was not enough to let two people go, so the officers arrested Joseph Taylor and removed the handcuffs from Howard Taylor and released him. Officer #2, in his official incident report, stated that the

officers turned over $400 to the police department along with the drugs and paraphernalia. The officers were found guilty on indictments charging them with larceny of $3,980 and of using and threatening to use their powers as police officers to extort money.

The Appeals Court held that although there was no evidence that Officer #2 spoke words of extortion, there was ample evidence of his actions, from which the jury could infer that he was aware of Officer #1's extortionate efforts, shared with him the intent to extort, and actively assisted in the crime. There was also evidence that Officer #2 took money from Howard Taylor with intent to steal it and that Officer #1 knew of the theft and was a joint venturer in the larceny.

Circumstantial evidence established that fingerprint was impressed at time crime was committed. Commonwealth v. Hall, 32 Mass. App. Ct. 951 (1992). A man entered the Harvard Square Cleaners, spoke to the sales clerk, and left briefly after saying he had to use the bathroom. When he returned, he held a knife to the clerk's neck, opened the register, and took $400. He then shut the clerk in the bathroom and tied the door shut. The defendant's fingerprint was found on the doorknob of the bathroom. The clerk could generally describe the robber, and could not identify the defendant as the robber. The defendant was convicted of armed robbery. The defendant claimed that there was no evidence of when the fingerprint was placed on the doorknob.

Although the prosecution must reasonably exclude the hypothesis that the fingerprint was impressed at a time other than when the crime was being committed, the Appeals Court concluded that the prosecution did so in this case. Specifically, the Court found that the jury could infer that the defendant was the person who committed the crime because (1) the employee would have recognized him if he was a regular employee, customer, or delivery person; (2) since the robber left the store to use the bathroom, and was therefore unfamiliar with the fact that the store had a bathroom, it was reasonable to infer that he had no prior opportunity to place his fingerprint on the door handle; and (3) the fingerprint was unsmudged and the bathroom was used regularly by all the store's employees, and it was therefore reasonable to infer that the print was put there by one of the last people to touch the knob.

Witness waived right to invoke Fifth Amendment privilege when voluntarily testified in two previous hearings. Commonwealth v. Penta, 32 Mass. App. Ct. 36 (1992). A private citizen, Mueller, told the police that he could purchase drugs from the

defendant. He set up a drug deal with the defendant, and the police obtained a one-party consent interception warrant. Mueller wore the recording device during the drug deal. The police set up surveillance near Mueller's home. The police heard Mueller and the defendant discuss the deal, and heard the defendant begin counting the money, then say that he wanted to take the money when he went to get the cocaine. Mueller talked him out of taking the money, and the defendant responded that ht would be back in half an hour. The police saw the defendant drive to the area of Mueller's home, and let another individual out of the car who was carrying a brown package and wearing a beeper. The defendant entered Mueller's home, and told him that he would beep someone, who would meet them outside with the cocaine. The police then arrested the defendant and the individual he had let out of the car.

At trial, the defendant raised an entrapment defense, and indicated he intended to call Mueller as a witness. Mueller, however, indicated he intended to invoke his privilege against self-incrimination. At a hearing before trial, Mueller had testified that he consented to wearing the wire. Following that hearing, he recanted, and at a later hearing testified that he had been coerced into wearing the wire. At trial, the judge found that he would not be required to testify, since his testimony would have produced evidence that could have been used against him at a perjury proceeding. The Appeals Court concluded, however, that because Mueller had voluntarily testified at the pre-trial hearings, he waived his right to exercise his privilege against self-incrimination as to questions seeking related facts. The Court further held that, had Mueller testified, his testimony would have been relevant and material on the elements of the defendant's entrapment defense. Therefore, the Appeals Court reversed the defendant's conviction.

The defendant also claimed that because the police were not designees of the Attorney General they were not authorized to apply for the interception warrant. The Court noted, however, that because the recording and transmitting took place during the course of an investigation of a designated offense as defined in G.L. c. 272, §99B4, no "interception" occurred, so the requirements of G.L. c. 272, §99 did not apply. Therefore, the fact that a police officer, rather than the Attorney General or his designee, applied for the warrant, did not affect the validity of the warrant.

Where defendant could not reasonably have believed prosecution reneged on agreement, court would not enforce alleged agreement. Commonwealth v. Doe, 412 Mass. 815 (1992). The defendant was indicted on four counts of trafficking in

cocaine. He agreed to assist the police. A State Trooper told the defendant that he would only "get credit for" information that led to something productive. None of the information provided by the defendant proved to be productive. The defendant persuaded his former roommate to help him by assisting the trooper. According to the trooper, the special arrangement with the roommate was geared toward addressing the defendant's bail situation. The defendant believed he could be more productive, and thereby increase his chances of reducing his sentences, if his bail were reduced. The defendant's roommate eventually provided information that resulted in the arrest of an individual for trafficking in cocaine. The Comonwealth never took steps to reduce the defendant's bail. The defendant filed a motion for an order to compel the Commonwealth to adhere to its alleged agreement with him to reduce the charges against him in return for his assistance to law enforcement officials. The trial judge found that the Commonwealth had impliedly contracted with the defendant that he would get his charges reduced if he supplied useful information.

On appeal, the Supreme Judicial Court concluded that, although enforcement of a prosecutor's promise could be a legal basis upon which a judge could reduce the charges against the defendant over the Commonwealth's objection, in this case it was not reasonable for the defendant to believe that his roommate's information would result in a reduction of the charges, and it was unreasonable for the defendant to conclude that productive information would lead to anything more than consideration by the assistant district attorney, and the defendant has not shown, at this pre-trial stage of the proceedings, that the Commonwealth failed in that promise.

Hypnotized witnesses could not testify to identification of defendant's car where there was no evidence that they could have identified the car before being hypnotized. Commonwealth v. Kater, 412 Mass. 800 (1992). In preparation for the third trial, the Commonwealth profferred testimony of four hypnotized witnesses concerning the identification of the defendant's car. The Supreme Judicial Court agreed with the trial judge that the Commonwealth had not proved by a preponderance of the evidence that the witnesses were capable of identifying the car prior to hypnosis. Although during hypnosis no questions were asked concerning the identity of the defendant's car, the judge concluded that there was no evidentiary basis for concluding that the witnesses could have identified the car prior to hypnosis. The witnesses did not identify the car prior to hypnosis, their descriptions of the car prior to hypnosis were not specific enough to indicate an ability to identify the car,

and no new credible evidence was introduced tending to show the extent of their prehypnotic memories.

The Court concluded that the witnesses can testify to circumstances of what occurred during their attempt to identify the car, and may be asked whether there are any similarities or differences between the defendant's car and the one they saw on the scene.

SIGNIFIANT ACTIVITIES OF THE OFFICE OF THE ATTORNEY GENERAL

Below is a sampling of cases handled by the Criminal Bureau and Government Bureau of the Office of the Attorney General. This list is by no means exhaustive, but is provided as an example of the types of cases handled by these bureaus.

CRIMINAL BUREAU

Appellate Division

An individual who was convicted of assault and battery on a police officer filed a civil rights action against a Lieutenant in the Internal Affairs Division alleging that he failed to properly investigate an alleged assault and battery of the plaintiff by the arresting officers. This office represented the Lieutenant, whose motion to dismiss was allowed, since there was no connection between his actions as a member of the IAD and the plaintiff's conviction.

In a growing number of civil cases (e.g. wrongful death actions), parties have subpoenaed District Attorney, Attorney General, and/or police department files concerning an underlying criminal case for use in the civil case. This office (on behalf of District Attorney's and State Police) has filed motions for protective orders to prevent disclosure of the files, since they are criminal investigative materials which are not subject to disclosure.

Public Integrity Division

Indictment of Department of Public Welfare social worker for alleged larceny of approximately $50,000.

Arrest of candidate for county sheriff on charge of forgery of nomination papers.

Indictment of former school district treasurer for larceny of approximately $1 million in regional school district funds.

Conviction of former Department of Public Welfare employee on larceny and forgery charges for check forging scheme. Sentenced to three to five years in state prison, suspended for two years, and restitution.

Indictment of city council president, school committee member, an attorney, and a real estate developer for state income tax violations.

Medicaid Fraud Control Unit

Pharmacy, owner, and employee indicted on larceny and false claims charges totalling $35,000. Alleged fraud involved billing Medicaid for far larger quantity of incontinent pants than actually dispensed.

Former owner/administrator of nursing home indicted on multiple counts of embezzlement, larceny, and submitting false claims for welfare benefits and employment compensation benefits.

Provider of specialized pediatric services agreed to provide restitution and free community-based pediatric care in the amount of $12 million in civil settlement.

Civil settlement for $30,000 reached with obstetrician for use of alleged improper billing codes to the Department of Public Welfare.

Civil settlement for $17,500 reached with general practitioner for alleged upgrading of service codes.

Complaints issued against several nurse-aides for abuse and neglect in nursing homes.

Division of Employment and Training

Prosecution of four individuals in separate schemes to collect unemployment benefits for person incarcerated in house of correction and state prison.

Four individuals pleaded guilty to stealing D.E.T. checks. Two received 2 1/2 years in the House of Correction, eight months to serve, the balance suspended for five years, and restitution in the amount of $22,856.

Environmental Strike Force

Defendant plead guilty to illegal removal of lead paint, received maximum fine of $1,000.

After defendant company repeatedly failed to appear for arraignment, court entered guilty findings on four

indictments charging felony violations for knowing transfer of hazardous waste to an unlicensed contractor, knowing endangerment of human health and safety and the environment, storage of hazardous waste without a license, and storage of hazardous waste in a manner inconsistent with Massachusetts regualtions. The court imposed the maximum fine of $100,000 per indictment ($400,000).

132 indictments returned against an individual and two companies for violations of the solid waste act, air quality act, and oil and hazardous material release prevention and response act.

Indictments returned against former shellfish warden and five others for shellfishing at night in a contaminated area of New Bedford harbor.

Exterminator pleaded guilty to nine complaints charging unlicensed pesticide application, and was fined $300 per indictment ($2,700 total).

Narcotics and Organized Crime Division

Indictment and arraignment of four individuals on cocaine trafficking and conspiracy charges; civil action filed to forfeit automobile repair shop business.

Guilty plea for trafficking in 100 pounds of marijuana.

Fugitive arrested in Maine on 1989 indictment for trafficking in over 200 grams of cocaine.

Defendant pleaded guilty on charge of marijuana cultivation; received sentence of two years in the House of Correction, suspended for two years.

GOVERNMENT BUREAU

Planned Parenthood League v. Operation Rescue, et al. On October 17, 1991, the court entered a permanent injunction barring Operation Rescue, 39 named individuals and those acting in concert with them from blocking access to abortion facilities in the Commonwealth. Under the Mass. Civil Rights Act, violation of the injunction is a criminal offense.

Mullins v. Commonwealth. Plaintiff's car was hit broadside by a MDC cruiser that was pursuing another vehicle, but failed to activate its lights or siren. The case settled for $27,000.

Loomis v. Personnel Administrator. The Appeals Court affirmed rulings of the Personnel Administrator and the Civil Service Commission that had approved the Town of Abington's decision not to promote a police officer against whom a G.L. c. 209A domestic violence restraining order had been issued.

Watson v. Gnazzo. A Superior Court judge held that a finding of "responsible" for a civil motor vehicle infraction can be considered a "conviction" for purposes of the habitual traffic offender statute, even though the driver does not actually pay a fine or assessment for the infraction.

Tate v. Hardy. Successful defense of a case alleging intentional torts and civil rights violations when Capitol Police officers searched the plaintiff in the basement of the Hurley Building.

ASSISTANCE AND CONTACTS AT THE OFFICE OF THE ATTORNEY GENERAL

Below is a list of individuals at the Office of the Attorney General who you can call for assistance. The main office number for all extensions listed below is (617) 727-2200. The office address is: Office of the Attorney General, 1 Ashburton Place, Boston, MA 02108.

	Ext.
Scott Harshbarger, Attorney General	2042
Thomas Green, First Assistant	2057

CRIMINAL BUREAU

Edward Rapacki, Bureau Chief	2810
Pamela Hunt, Chief, Appellate Division	2826
Michael Cassidy, Chief, Narcotics Division	2517
Patricia Bernstein, Chief, Public Integrity Division	2856
David Burns, Chief, Special Investigations Division	2589
Lt. Edward Johnson, Chief, Criminal Investigations Division	2812
Martin Levin, Chief, Environmental Strike Force	2858
Maurice Cunningham, Chief, Asset Forfeiture Unit	2510
Michael Kogut, Chief, Medicaid Fraud Control Unit	3814
James Bryant, Chief, Insurance Fraud Unit	2866
Brian Burke, Chief, Division of Employment & Training	727-6824

FAMILY AND COMMUNITY CRIMES BUREAU

Jane Tewksbury, Bureau Chief	2049

PUBLIC PROTECTION BUREAU

Barbara Anthony, Bureau Chief.....2925

GOVERNMENT BUREAU

Judith Fabricant, Bureau Chief.....2062

LAW ENFORCEMENT NEWSLETTER

LaDonna Hatton, Editor.....2822

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Law Enforcement Newsletter

FROM THE OFFICE OF THE
Attorney General
For The Commonwealth of Massachusetts

Scott Harshbarger
Attorney General

Contact:(617)727-2200

Vol. II, No. 2 November 1992

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Letter From The Attorney General

November, 1992

To members of the Law Enforcement and Criminal Justice Community:

The Criminal Bureau has just completed its Fiscal Year 1992 Annual Report. The report reflects the various types of cases that the Bureau is prosecuting, often in conjunction with other state agencies and local police departments. It also reflects how we have begun to carve out a role that we believe best utilizes our resources, best addresses those issues that have not previously been the focus of the Attorney General's office and complements the exceptional work that is done by the entire law enforcement community, particularly in light of severe budget reductions during the last several years.

Since coming into office 22 months ago, I have made it a priority to expand the range, focus and resources of our Criminal Bureau to ensure that the Attorney General's office is doing all we can to help you meet the challenges we all face and to articulate and enforce the principle that the law should apply equally to all. To that end, we have made white collar crime, public corruption, fraud and urban violence major Criminal Bureau priorities.

Our emphasis upon these areas is designed to send some very important messages to the citizens of this Commonwealth. And the first one is very simple: the amount and cost of "white collar" crime (individual or organized) to each of us is staggering. The S & L scandal is just one example. These crimes can no longer be seen as "victimless." We all pay and will pay for them -- in increased insurance rates, taxes, prices, health care costs, the bankruptcy of needed public benefit programs and business enterprises and lost jobs, not to mention the loss of faith in our public and private institutions by citizens. In one dramatic (but not uncommon) example, an elderly victim of a financial scam said to me, "A robber can steal my money, but he can't steal my house, home and future." White collar criminals can, and too often, do.

The second message is to those who feel that some are above the law or free to abuse their public or private positions of trust by virtue of the privilege of their "white collar" status as public servants, business executives, attorneys, financial advisors, or medical or educational professionals. We want them to know they cannot violate the law with impunity. They

will be held accountable for their criminal actions, particularly when they target and steal from vulnerable victims or public agencies.

Third, by aggressively investigating and prosecuting cases in a fair but balanced manner, based on the facts and the law, regardless of professional or socioeconomic status, we not only demonstrate to the public that there truly can be "equal protection under the law," but we also demonstrate this tenet to the overwhelming majority of public and private officials who do their jobs effectively, honestly and with great dedication. Our goal is to fulfill our responsibility to all of you by ensuring that the small minority who violate the law, and thereby "taint" us all, are identified and prosecuted.

As this office continues to develop our criminal prosecution role, our focus will always be on restoring confidence in the concept of swift, firm, fair and equal justice, deterring crime before it occurs, reaching out to the entire law enforcement community to share resources and ideas, and to do all we can to ensure efficient training and coordination. As you review the highlights of the report, I hope you will find these fundamental beliefs reflected in the work or every Division of the Bureau.

The Economic Crimes Division:

The Economic Crimes Division, led now by John Ciardi, includes several units which in large part focus on criminal prosecutions of consumer and white collar fraud and crime: tax evasion, insurance and workers' compensation fraud, financial exploitation of the elderly, consumer and charities fraud, fiduciary embezzlements and other similar crimes that result in the exploitation of consumers.

The Tax Prosecution Unit, supervised by Andrew Zaikis, obtained 21 convictions in cases involving tax evasion and wilful failure to file tax returns. Of these convictions, seven resulted in incarceration. Notably, one case resulted in a fine of $175,000 payable to the Commonwealth, which represented the largest single fine ever imposed in a tax prosecution. The Springfield City Council president and his attorney were also indicted on charges involving the alleged failure to pay taxes on more than one million dollars earned by the Council president.

Working closely with the Insurance Fraud Bureau, the Governor's Auto Theft Strike Force and private insurers, the Insurance Fraud Unit, headed by James Bryant, focuses on auto insurance fraud, homeowners insurance and workers compensation

fraud, and fraud by individuals in the insurance industry. Since July 1st of this year, IFU has been given resources devoted solely to prosecution of workers' compensation fraud.

Thirteen separate cases brought by the Insurance Fraud Bureau resulted in either indictments in Superior Court or criminal complaints in a variety of district courts. Most of these cases are still pending, but four did result in convictions. One case that will soon go to trial involves six individuals who were indicted on charges relating to a multi-million dollar auto insurance fraud ring. The defendants allegedly staged accidents and filed false insurance claims that amounted to over $3 million. This proves yet again that insurance fraud is not a victimless crime: we all pay when insurance premiums spiral upward due to the kind of egregious fraud exemplified by this Somerville ring.

In keeping with our pledge to protect the financial rights and interests of the elderly, the Economic Crimes Division obtained indictments against financial advisors, stockbrokers and attorneys who allegedly preyed upon unsuspecting elderly citizens. An example of this unscrupulous behavior involved a Newton attorney who was indicted on 13 counts of larceny, eight counts of forgery and four counts of embezzlement by a trustee as a result of schemes to defraud several clients of funds totalling more than $360,000.

<u>The Public Integrity Division</u>:

In an effort to restore public confidence in government, and on behalf of the vast majority of our public officials and employees who adhere to the highest standard of honesty and integrity in their public service, the Public Integrity Division focuses on public corruption at every level. The Unit is now headed by Mark Smith (replacing Patricia Bernstein who, after building this unit and laying a solid foundation, has become, at my request, the Chief Prosecutor in our Public Protection Bureau).

Overall, 30 defendants were indicted and several of the longest state prison sentences ever imposed were obtained in public corruption cases. In addition, restitution in the amount of $426,134 was obtained for the Commonwealth.

As an example, this month, a former official of the Ashburnham-Westminster Regional School District was found guilty on charges of embezzlement involving over $1 million and was sentenced to 12-to-15 years in state prison. In September, a former Department of Welfare accountant pleaded guilty to charges of stealing approximately $300,000 from the state and

was sentenced to 10 years in state prison and ordered to pay a fine of $90,000.

The Urban Violence Strike Force:

The Strike Force is designed to provide supplemental prosecutorial resources to District Attorneys to improve the quality of life for residents of the Commonwealth's inner cities. To that end, we have five Assistant Attorneys General working on a rotating quarterly basis with District Attorneys in the Lawrence, Lowell and Brockton District Courts. We have had three Assistant Attorneys General working full-time since April, 1991 in the Suffolk County District Attorney's Gang Task Force.

The Suffolk Strike Force obtained 99 convictions leading to the imprisonment of 91 defendants convicted of gun, drug or gang violence charges. We plan to continue this commitment as a part of our overall office priority and focus on urban issues.

The Medicaid Fraud Control Unit:

Under Michael Kogut, this unit investigates and prosecutes waste, fraud and abuse within the Medicaid program. In addition to civil enforcement, the Unit has prioritized criminal prosecutions of those in the medical and provider communities who intentionally and egregiously use their professional positions and opportunities to steal desperately-needed Medicaid resources, and bring into question the overall integrity of the health care delivery system for the poor and elderly.

In fiscal year 1992, MFCU returned 36 indictments, obtained seven convictions, garnered the first two jail sentences for physicians in recent memory and recovered nearly $13 million. MFCU reached the largest civil settlement in its 14-year history when it entered into a $12 million settlement with the Franciscan Children's Hospital and Rehabilitation Center, based on overgeneration of Medicaid revenue over a period of approximately five years.

MFCU also continues to investigate and prosecute patient abuse in long-term care facilities. Fifty-six criminal investigations were initiated, resulting so far in four convictions. This is an area of great concern to our office because the institutionalized elderly and the disabled are particularly vulnerable.

The Narcotics and Organized Crime Division:

In spite of our drastically reduced complement of State Police, this Division, under Michael Cassidy (recently named

Deputy Chief of the entire Bureau), has vigorously targeted large scale drug traffickers involved mainly in cocaine trafficking and marijuana smuggling, and has expanded its efforts to seize and forfeit assets of drug dealers which are traceable to narcotics activity. Four kilograms of cocaine, 200 pounds of marijuana and 100 packets of heroin were seized in fiscal year 1992. The Asset Forfeiture Unit received forfeiture orders for over $274,000 in cash and numerous pieces of real estate and automobiles.

A good example of our efforts against organized crime centered around indictments of a USAir gate agent and his accomplices relating to the alleged illegal resale of approximately 3,200 stolen USAir travel vouchers and coupons. Over 850 of these vouchers were redeemed for airline tickets, representing a loss to the company of nearly $1 million, before the thefts were detected. Four individuals were indicted and their cases are pending.

Under its new head, Alexander Nappan, the Division will continue to work with local law enforcement to focus on multi-county organized criminal activity of all types -- from breaking and entering and robbery rings, to computer crime.

<u>The Division of Employment and Training</u>:

Employers who fail to pay unemployment contributions owed to the Department of Employment and Training and individuals collecting unemployment benefits while gainfully employed and earning wages, are subject to criminal prosecution. Working closely with, and funded by, the Department of Employment and Training, our DET Unit, headed by Brian Burke, is a critical part of our fraud priority and our effort to ensure a level playing field for those businesses and individuals who, even in tough economic times, comply with the law and do not shirk their responsibility within the unemployment system.

In fiscal year 1992, DET disposed of 256 cases, arrested 173 persons for violation of the Commonwealth's unemployment benefit laws and collected nearly $1 million in restitution. In recognition of the seriousness which these cases merit, several defendants received jail time.

This reinvigoration of DET is crucial and demonstrates the firmness necessary to discourage business and individual decisions and practices that can undermine a system when funds are desperately needed to assist the legitimately unemployed people of Massachusetts in troubled times.

The Environmental Strike Force:

The Strike Force, financed and staffed jointly by our office and the Department of Environmental Protection (DEP), has a mandate to aggressively enforce environmental laws in the Commonwealth. From the "marquee" cases involving large corporate offenders to the volumes of smaller polluters who violate wetlands, lead paint and workplace safety laws, and solid and hazardous waste disposal laws, who collectively pose a significant threat to public health and the environment, the Environmental Strike Force acts upon the principle that crimes against the environment victimize us all.

To that end, in 1992, the Strike Force, under Martin Levin in this office and Ann Kelly of DEP, brought criminal charges in 16 environmental cases, compared to a total of 20 new cases brought in the previous four years. And the Strike Force is actively working with and providing training for local police, fire, public health and conservation commissions, to enhance referrals and local enforcement efforts.

The fight against environmental crime must be waged at a legislative level as well. We have introduced the Environmental Law Enforcement Fund and Forfeiture Bill, which would allow courts to require convicted environmental criminals to forfeit the assets they used to commit their crimes or the proceeds they gained as a benefit. The proceeds would then be directed back into law enforcement efforts, so that convicted criminals, not taxpayers, would be supplementing our budgets for investigations and prosecutions.

Additionally, we have filed the Environmental Endangerment Act, which provides for felony charges for environmental violations which have actually caused a substantial risk to human health, natural resources or private property, instead of the usual misdemeanors. It would also provide for higher fines when an organization, as opposed to an individual, is involved in a violation. These legislative tools are crucial if we are to be serious in our efforts to effectively combat environmental crime.

The Appellate Division:

Assistant Attorney General Pamela Hunt is the chief of the Appellate Division. Attorneys in this Division handle criminal appeals from convictions obtained by the Attorney General's office; defend against all federal habeas corpus petitions filed by Massachusetts prisoners; represent the judiciary, and various agencies and officials in civil rights cases brought by criminal defendants, prisoners, probationers or parolees; and represent District Attorneys and State Police in civil litigation.

Though only a part of many successes, the Appellate Division devoted a great deal of its resources to 147 federal habeas corpus proceedings in various federal courts. Of the 72 cases that reached final disposition, the Appellate Division won 71.

Effective, quality defenses to attacks upon state convictions are a fundamental aspect of law enforcement that ensures the integrity of the system and reinforces the message that justice must be swift, sure, equal, firm and final. The writ of habeas corpus is and should always be available to those who have been wrongly incarcerated, but it cannot become a convenient excuse to sidestep the law. The Appellate Division's record is a tribute to the quality of the work they do and an affirmation of the quality professional job that is done day-in and day-out by law enforcement officials in the Commonwealth.

Conclusion

As law enforcement and the criminal justice system continue to cope with a variety of criminal justice and societal problems in the 1990's, I am proud of the efforts and successes of our Criminal Bureau; but we, too, share your frustrations in trying to meet these challenges with exceedingly limited resources. Yet, I firmly believe that by focusing on areas of criminal prosecution that complement, rather than duplicate, the efforts of the law enforcement community as a whole, we can ensure swift and equal justice, achieve the greatest deterrence possible to white collar criminal activity, and support the fine work that you do every day in combatting and prosecuting crime of all kinds.

I hope this brief review of the Attorney General's Criminal Bureau activities in 1992 will give you a better understanding of the types of cases we handle and encourage you to call on us for assistance in any of these areas. In subsequent Newsletters, I will include updates of activities of the many other Divisions in our office (from consumer, to family and community crimes, to municipal law) which may be of assistance to you as well.

Thank you for your support during these first two years of my term. I have learned from you and I look forward to continuing our work together to meet the problems and challenges that we in law enforcement and the criminal justice system face. Please continue to contact us with your comments, questions or suggestions about how this office can better work with you.

Sincerely,

Scott Harshbarger

THE CRIMINAL JUSTICE LEGISLATION SUMMIT: A CONSENSUS FOR ACTION

an editorial opinion
by
The Criminal Justice Legislation Consortium*

During the last decade the law enforcement and criminal justice communities have been called upon to deal with an ever-expanding range of societal problems, in addition to the "traditional" crimes of violence for which they have always been responsible. More than ever, police, prosecutors, judges and others in the criminal justice system are now on the "front lines" fighting against violent street crime, family violence, drug and drug-related crime, as well as increasingly sophisticated organized and white collar crime.

In a virtually unprecedented bipartisan show of unanimity, Governor Weld, Lt. Governor Celluci, Attorney General Harshbarger, the district attorneys of the Commonwealth, and the leadership of the Massachusetts Police Chiefs Association recently met and reached a consensus in support of the passage of certain criminal justice bills currently pending in the Legislature. All of the bills have already been filed (many of them in previous legislative sessions), been considered at public hearings and now warrant prompt action by the Legislature during this fall's legislative session. Many have already been reported on favorably by one or more legislative committees.

The "package" of 13 bills being supported by the Criminal Justice Legislation Consortium was carefully crafted, the result of a concerted effort to advocate the passage of bills which have not aroused controversy or major expressed opposition, and which would provide enormous assistance to law enforcement.

Now is the time for action.

The Consortium's legislative efforts focus on three major areas of law enforcement:

* Violent Crime;

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* The Criminal Justice Legislation Consortium consists of Governor William Weld, Lt. Governor Paul Cellucci, Attorney General Scott Harshbarger, the Commonwealth's district attorneys and the Massachusetts Police Chiefs Association.

* White-Collar Crime; and

* Law Enforcement Tools

Each of the 13 bills which make up the package addresses one or more of these areas, and would fill gaps in the current state. laws which often frustrate law enforcement, the public and victims.

It should be emphasized that each member of the Criminal Justice Legislative Consortium also supports other important pieces of legislation which are not included in the 13-bill "package". However, this "package" list consists of those bills on which there is no law enforcement community dissent, thus making it more reasonable to work with the Legislature for immediate action on these targeted "consensus" bills.

The following are just a few examples of what some of the proposed bills would accomplish:

* The bail statute would be amended to allow a judge to consider a defendant's dangerousness as a factor at a bail hearing.

* In criminal cases which cut across county lines, the Attorney General would be able to present evidence to one grand jury, rather than going to several grand juries sitting in whichever county the alleged crimes occurred.

* The antiquated de novo system, which is unique to Massachusetts, and wastes scarce judicial resources, revictimizes and inconveniences witnesses, the police and other law enforcement and judicial personnel by allowing defendants to have two trials in the district courts, would be abolished.

As these examples demonstrate, the proposed legislative changes are not complex or controversial. They would simply allow police, prosecutors and the courts to do their jobs more effectively and efficiently.

Public protection and public safety are not Democratic or Republican issues, nor are they liberal or conservative issues. As shown by the bipartisan support which has been gathered in the law enforcement community for this criminal justice legislative package, the goal is simply to meet a fundamental obligation of government to provide for the protection of the public. This goal must be achieved and must be accorded a substantive priority above politics as usual.

These bills, as demonstrated by the bipartisan support for them, deserve passage before the end of this legislative session.

We, the members of the Criminal Justice Legislation Consortium, urge the Legislature and the public to join with us in our efforts to more effectively and efficiently provide for the safety and protection of the citizens of the Commonwealth by passing these bills. Working together, we can make a genuine difference in the quality of life in Massachusetts and ensure that justice is sure, swift, firm, fair and equal.

BAIL STATUTE AMENDMENTS

On October 7, 1992, Governor Weld signed into law legislation which reformed the state's bail system. Under the law as it stood before the amendment, a person setting bail was limited to considering only the risk that the arrestee might flee prior to trial, and was prevented from considering the danger an arrestee posed to another individual or the community when setting bail.

The new legislation amends the bail statutes, G.L. c. 276, §§57 and 58, to allow judges and other persons authorized to set bail to consider the danger an arrestee poses to any other person or the community as an equal factor along with the risk that the arrestee might flee prior to trial. The amendments also prevent clerks, bail commissioners, or masters in chancery from releasing an arrestee charged with violating a domestic restraining order from the police station until a judge has had the opportunity to consider fully the question of bail at the arrestee's initial court appearance.

Under the new legislation, judges are required to take into account in setting bail whether the charges against the arrestee involve abuse between family or household members as well as any violations of domestic restraining orders.

Finally, the amendments require the Governor to direct the Secretary of Public Safety to collect and study data regarding prison overcrowding, the operation criminal courts and information management systems within those courts, judicial and administrative procedures regarding parole and probation revocation and the experience of the courts in implementing this legislation as the legislation relates to domestic restraining orders. The Secretary of Public Safety is also required to make findings concerning the cost impact of a presumptive forty-eight hour detention period for certain arrestees, and must then make recommendations to the clerk of the House of Representatives regarding the orderly and effective use of resources to effect the goal of preserving the public safety under the state's bail system.

Following is the text of the legislation.

Chapter 201

THE COMMONWEALTH OF MASSACHUSETTS

In the Year One Thousand Nine Hundred and Ninety-Two

AN ACT RELATIVE TO THE RELEASE ON BAIL OF CERTAIN PERSONS.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Section 57 of chapter 276 of the General Laws, as appearing in the 1990 Official Edition, is hereby amended by inserting after the word "bail", in line 10, the first time it appears, the following words:- if he determines that such release will reasonably assure the appearance of the person before the court and will not endanger the safety of any other person or the community.

SECTION 2. Said section 57 of said chapter 276, as so appearing, is hereby further amended by inserting after the first paragraph the following paragraph:-

Notwithstanding the foregoing, a person arrested and charged with a violation of an order or judgment issued pursuant to section eighteen, thirty-four B or thirty-four C of chapter two hundred and eight, section thirty-two of chapter two hundred and nine, section three, four or five of chapter two hundred and nine A, or section fifteen or twenty of chapter two hundred and nine C, or arrested and charged with a misdemeanor or felony involving abuse as defined in section one of said chapter two hundred and nine A while an order of protection issued under said chapter two hundred and nine A was in effect against said person, shall not be released out of court by a clerk of courts, clerk of a district court, bail commissioner or master in chancery.

SECTION 3. Section 58 of said chapter 276, as so appearing, is hereby amended by inserting after the word "discretion", in line 11, the following words:- that such release will endanger the safety of any other person or the community or.

SECTION 4. Said section 58 of said chapter 276, as so appearing, is hereby further amended by inserting after the word "nature", in line 15, the following words:- and seriousness of the danger to any person or the community that would be posed by the prisoner's release, the nature.

SECTION 5. Said section 58 of said chapter 276, as so appearing, is hereby further amended by inserting after the word "charge", in line 24, the following words:- , whether, the acts alleged involve abuse as defined in section one of chapter two hundred and nine A, or violation of a temporary or permanent order issued pursuant to section eighteen or thirty-four B of chapter two hundred and eight, section thirty-two of chapter two hundred and nine, section three, four or five of chapter two hundred and nine A, or section fifteen or twenty of chapter two hundred and nine C, whether the prisoner has any history of orders issued against him pursuant to the aforesaid sections.

SECTION 6. The governor shall direct the secretary of public safety to collect and study data regarding overcrowding conditions in the commonwealth's prisons, houses of corrections, and municipal police overnight detention factilities, the operation of the courts of criminal jurisdiction of the commonwealth, information management systems within those courts, the judicial and administration procedures regarding revocation of parole, revocation of conditional release, and revocation of probation, the experience of the courts implementing the foregoing sections of this act as they relate to violations of restraining orders under chapters two hundred and eight, two hundred and nine, two hundred and nine A and chapter two hundred and nine C of the General Laws, as well as federal and state administrative and judicial procedures regarding deportation of illegal aliens.

Said secretary shall make findings regarding the cost impact on the courts and correctional facilities within the commonwealth, as well as the effect on the administration and personnel of same, of several models of a presumptive forty-eight hour detention period for all prisoners pending revocation of parole, revocation of conditional release, revocation of probation, deportation, or trial for violation of restraining orders under said chapters two hundred and eight, two hundred and nine, two hundred and nine A and chapter two hundred and nine C. Said secretary shall make recommendations regarding the orderly and efficient use of available resources to effect the goal of preserving public safety under the provisions of section fifty-eight of chapter two hundred and seventy-six of the General Laws. Said secretaty shall report his finding to the clerk of the house of representatives who shall forward the same to the committees on criminal justice, as soon as may be reasonably found to be convenient, but in no event later than December thirty-first, nineteen hundred and ninety-two.

USE OF VOICE RECORDING DEVICES

by: Robert N. Sikellis, Assistant Attorney General

Over the course of the past few months, the Attorney General's Office has received several inquiries from members of the law enforcement community regarding the legality of using voice recording devices. An area which apparently has sparked some of these inquiries is the proposed use of such recording devices by police when they are investigating drunk driving offenses. What follows is a general outline of the law in this area.

Any police use of a device capable of recording oral or wire communications must comply with G.L. c. 272, § 99, the wiretap statute. This statute expressly prohibits recording conversations absent a warrant or the consent of all parties to the conversation. Any person who willfully violates this statute faces a maximum term of imprisonment of five years and/or a ten thousand dollar fine.

The wiretap statute authorizes the use of recording devices by law enforcement officials, but only if a number of requirements are met. The purpose of imposing strict requirements is "to ensure that unjustified and overly broad intrusions on rights of privacy are avoided." Commonwealth v. Vitello, 367 Mass. 224, 231 (1975). "Careful attention to the statutory directives is required". Id.

The first requirement is that the use of such devices must be conducted under strict judicial supervision and should be limited to the investigation of organized crime. Subsection B7 requires that the offense being investigated must be a "designated offense" in connection with organized crime. Subsection B7 of the wiretap statute lists the designated offenses, which include, among others, murder, extortion, bribery and narcotic offenses.

Assuming the existence of a designated offense, the wiretap statute requires that a warrant be obtained. Authority to apply for each wiretap warrant must be specifically granted in writing by the Attorney General or one of the district attorneys, as the case may be. G.L. c. 272, §§ 99F1. Commonwealth v. Vitello, 367 Mass. 224, 232 (1975). Among numerous other requirements, all outlined in subsections E, F, and G of section 99, the application in support of the warrant must set forth probable cause. The probable cause required for electronic surveillance "is no different from that which is

necessary to obtain a warrant for a physical search." Commonwealth v. Wallace, 22 Mass. App. Ct. 247, 248, rev. denied, 398 Mass. 1101 (1986).

Section 99E3 also requires that there be "a showing by the applicant that normal investigative procedures have been tried and have failed or reasonably appear unlikely to succeed if tried." This requirement is meant to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime. Commonwealth v. Fenderson, 410 Mass. 82, 83 (1991). This standard is met where the affidavit "indicates a reasonable likelihood that normal investigative techniques have failed in gathering evidence, or would fail if attempted." Id. at 84.

As should be reasonably clear, the conditions which must be met before any recording device can be used are numerous and involved. In many instances, the conditions simply cannot be fulfilled. One such instance is the use of a recording device to investigate drunk driving offenses. First, operating a motor vehicle while under the influence is not a designated offense. Second, the statutory requirement that normal investigatory procedures be exhausted cannot be met. Third, the organized crime element is missing. Finally, the exception contained in section B4 does not apply to permit such a recording without a warrant or consent.

In conclusion, a recording device cannot be used to investigate drunk driving offenses absent the consent of the suspect. In most instances, it would be impractical to seek the suspect's consent because if the suspect refuses, further inquiry as well as an audible field sobriety test will be prohibited. It should be stressed, however, that one of the more valuable techniques for investigating drunk driving offenses, videotaping (without sound), is not prohibited.

CRIMINAL PROVISIONS OF THE NEW WORKER'S COMPENSATION LAW

by: James Bryant, Assistant Attorney General

The tremendous rise in worker's compensation rates in Massachusetts has led to increasing interest in revamping the worker's compensation system in order to eliminate fraudulent claims, and in prosecuting those who are abusing the worker's compensation system. Until recently, the worker's compensation statute itself did not contain criminal provisions. A fraudulent worker's compensation claim, if it was to be prosecuted at all, had to be charged under general larceny provisions (Mass. Gen. Laws c. 266, § 30) or under the insurance fraud statute (Mass. Gen. Laws c. 266, § 111A), which prohibits the fraudulent submission of any statement or other written document in support of an insurance claim. At the end of last year, the Legislature amended Massachusetts laws to specifically target some types of worker's compensation fraud for criminal prosecution.

The most common form of worker's compensation fraud occurs when the employee/claimant collects benefits from one employer at the same time that he is working at another job. One of the main problems in prosecuting such cases of worker's compensation fraud under the larceny and insurance fraud statutes, however, was that it was extremely difficult to prove fraudulent intent on the part of the defendant. This is because injured employees in worker's compensation cases often never personally submitted statements to insurer's in connection with their claim. When an employee was hurt in a work-related accident, commonly his employer filled out the initial accident report and wage verification information and the employee merely received benefits until he came back to work or the case was resolved in court. Moreover, employers and insurers generally did not provide any warnings or instructions to the employee as to his obligations under the worker's compensation system. As a result, there was little direct evidence that the employee <u>knew</u> that he was prohibited from working elsewhere while collecting benefits. Without clear evidence of requisite criminal intent on the part of the claimant, prosecution of worker's compensation fraud cases was extremely difficult.

The new worker's compensation statute added a criminal provision to the worker's compensation statute which prohibits a person from knowingly concealing or failing to disclose information which affects the worker's compensation payments owed to a claimant. G.L. c. 152, §14(B). Along with this

provision, the Legislature imposed upon all claimants an affirmative duty to report to the worker's compensation insurer all earnings, including wages or salary earned from self-employment. G.L. c. 152, §11D. Accordingly, because employees now must personally report all outside earnings while receiving worker's compensation benefits, a failure to disclose outside earnings should generally be sufficient evidence of criminal intent to prosecute cases of employee "double-dipping."

The new statute not only strengthens cases against worker's compensation claimants, it also provides additional ammunition to prosecutors against employers, insurers and professionals who commit worker's compensation fraud. Although this problem is less obvious than employee fraud, the rising costs of worker's compensation coverage has resulted in increasing focus on other types of worker's compensation fraud as well. The new statute is specifically tailored to combat this problem. Employers or insurers were not subject to the provisions of the insurance fraud statute. The new worker's compensation statute makes clear that employers and insurers who submit false statements in order to deny a claim are also guilty of worker's compensation fraud. Moreover, the new statute prohibits employers from misclassifying their employees or the nature of their work for the purpose of avoiding payment of worker's compensation insurance premiums. It also prevents employers from artificially claiming that their employees are "leased" from another company in order to hide their industrial accident loss history or the risks of their business.

Violations of the new worker's compensation statute are subject to imprisonment for up to five years in the state prison or by a fine of up to ten thousand dollars, or by both. Moreover, courts are required, after a defendant is convicted of worker's compensation insurance fraud, to conduct an evidentiary hearing to ascertain the extent of the damages or financial loss suffered as a result of the defendant's crime. A person found guilty of violating the statute must make restitution to any aggrieved person.

RECENT CASES

I. SEARCH AND SEIZURE

A. Searches Pursuant To Warrant

Magistrate can rely on common knowledge that a "forty" is a quantity of drugs. Commonwealth v. Byfield, 413 Mass. 426 (1992). The affidavit in support of an application for a search warrant stated that the affiant received a tip from a confidential informant who had provided information in the past leading to the arrest of three named individuals and seizures of cocaine and marijuana, and the arrest and conviction of a fourth individual on drug related charges. The affidavit indicated that the informant and a friend visited an apartment where the friend asked a woman for a "forty" and gave her $40, and the woman handed the friend a paper packet. The affidavit did not indicate whether the informant knew what was in the packet. The affidavit also indicated that the affiant made observations of the building and saw several young males enter the building, stay a moment, then exit and leave the area.

The Court held that the information provided by the informant satisfied the Aguilar-Spinelli test. The Court held that the magistrate could rely on reasonable inferences and common knowledge in concluding that the transaction witnessed by the informant involved illegal drugs, since it is within the common knowledge of the community that a "forty" is a $40 packet of drugs. In holding that the information was sufficient, the Court noted that all four prior instances of information obtained from the informant resulted in seizure of cocaine.

The Court noted, however, that the affidavit here "is not a model for the future," and that it would have been preferable for the affiant to indicate in the affidavit that, based on his experience, he was making the inference that a "forty" referred to a quantity of cocaine. The Court also noted that the observation of the males entering the building contributed nothing to the finding of probable cause, since there was no evidence that theses individuals were visiting the particular apartment for which the search warrant was issued, or even that the individuals observed were known drug users.

For warrant purposes, nighttime begins at 10:00 p.m. and ends at 6:00 a.m. Commonwealth v. Grimshaw, 413 Mass. 73 (1992). On December 22, 1990, the Cambridge police department applied for a search warrant, which was issued at about 4:30 p.m., after it was already dark. The warrant prohibited its execution "at any time during the night." The police immediately went to the premises to execute the warrant, and

entered in a peaceful manner while the defendant was awake and fully clothed. The warrant was executed at 8:50 p.m. Heroin was found, and the defendant was convicted of possession with intent to distribute a class A controlled substance, and knowingly being present where heroin was kept.

The Supreme Judicial Court held that, even if the search was conducted at "nighttime" in technical violation of the warrant, the evidence did not have to be suppressed given the circumstances of the search. The police entered the home in a peaceful manner after knocking; the time of the evening was not so late that most people would have been asleep; and the defendant and the other persons present in the apartment were awake, fully clothed and in the living room. The Court held that in these circumstances the police presence was not an intrusive violation of the sanctity of the home, which is what the nighttime limitation on execution of warrants was meant to preserve, and that suppressing the evidence would not deter future police misconduct, since the police at all times acted reasonably in obtaining and executing the warrant, and could have obtained a nighttime warrant had they requested one.

The Court announced that for warrant purposes, nighttime begins at 10:00 p.m. and ends at 6:00 a.m.

Affidavit in support of search warrant not defective where court could reasonably infer dates on which observations were made. Commonwealth v. Javier, 32 Mass. App. Ct. 988 (1992). The affidavit in support of an application for a search warrant stated that the police had conversations with the informant during the weeks of October 21 and 28, 1990, during which the informant stated that individuals "are operating" out of a particular premises, and that sales are "being conducted" out of that premises. The warrant was issued on November 8, 1992.

The Court stated that generally, observations relied upon in an affidavit in support of a search warrant must be made close to the time of the application for the search warrant, and an affidavit in support of a search warrant is seriously defective if it does not indicate when the observations relied upon were made. The Court held in this case that, although inclusion of the dates of the observations would have "much improved" the affidavit, a reasonable inference could be drawn, because the language in the affidavit was in the present tense, that the observations were made during the time the police had the conversations with the informant, between the weeks of October 21 and 28, 1990. Therefore, the Court concluded that the information was not stale, and the evidence seized should not have been suppressed.

Informant's veracity established where it was based on prior information which led to arrests of four unnamed individuals and seizures of contraband. Commonwealth v. Grady, 33 Mass. App. Ct. 917 (1992). The affidavit in support of an

application for a search warrant contained information from a confidential informant who had provided information to the police on four previous occasions. On three of those occasions, the information led to arrests and seizure of drugs, and on one occasion, led to an arrest and seizure of an illegal firearm. The affidavit did not contain the names of the arrested persons to protect the identity of the informant. The Superior Court judge suppressed the evidence.

The Appeals Court reversed, holding that the informant's veracity was established by the fact that the informant's prior information led to both arrests and seizures of contraband, and that it is not necessary to disclose the names of arrested persons, where to do so would infringe on the informant's anonymity.

B. Warrantless Searches

Students have reasonable expectation of privacy in school locker, but school officials need not obtain a warrant before searching a locker. Commonwealth v. Snyder, 413 Mass. 521 (1992). A student reported to a faculty member that the defendant attempted to sell him marijuana for twenty-five dollars. The student also reported that the defendant had shown him a video cassette case containing three bags of marijuana, which the defendant then placed in his book bag. The faculty member, who had a well-established reputation for reliability within the school, reported this information to the school principal. The assistant principal located the defendant in the crowded student center, but could not see the defendant's book bag. The school officials decided to search the defendant's locker before confronting the defendant, since they did not know if other students were involved and did not want to arouse suspicion. Using the combination to the defendant's locker that was available at the school's main office, the school officials opened the locker and found three bags containing marijuana. They then brought the defendant to the principal's office, where the defendant confessed to having sold a bag of marijuana and to owning the marijuana found in his locker. The school officials then called the police.

The Court held that while students have a reasonable and protected expectation of privacy in their school lockers, school officials are not required to obtain a search warrant before searching a locker. For a school official's search of a school locker to be constitutional under the federal constitution, the search must be reasonable in all the circumstances. The Court noted that they need not determine whether the Massachusetts constitution requires more than that the search be reasonable, since the school officials had probable cause to search the locker in this case. The school officials reasonably relied on information, relayed to them by

a reliable faculty member, from a student who was an eyewitness to a crime, and acted reasonably in attempting to locate the book bag before searching the locker.

The Court also held that the school officials were not required to give the defendant Miranda warnings prior to questioning him, even if the atmosphere was coercive, since the Miranda requirements do not apply to individuals who are neither law enforcement officials nor agents of such officials.

"Search on sight" policy not constitutional. Commonwealth v. Phillips, 413 Mass. 50 (1992). Police saw the defendants, two young black males, driving a Nissan Maxima, and had a hunch that the car was stolen. After the defendant's had parked the car and walked away, the police stopped the defendants, searched them, then placed them in the cruiser. The police then searched the Maxima and found a weapon. At a pre-trial hearing, the defendants introduced evidence that the police department had an official policy of searching on sight all known gang members and their associates.

The Court noted that, to justify stopping and frisking an individual, the police must be able to point to specific articulable facts which taken together with rational inferences from those facts, warrants a belief that the individual is armed and dangerous. The stop cannot be based on merely a hunch that the suspect is armed. Here, the hearing judge found that the police approached the defendants based on a mere hunch that the car was stolen. The Court also noted that the search of the car in this case could not be justified on the ground that the police were concerned for their safety since they did not search the car until after the defendants were already in the police cruiser.

Officer's belief that defendant was armed and dangerous was based on specific and articulable facts. Commonwealth v. Rivera, 33 Mass. App. Ct. 311 (1992). A State Trooper saw a car speeding, and, as he activated his blue flashing lights to pull the car over, the defendant, a passenger, looked back at the cruiser. As the driver pulled to the side of the road, the trooper saw the defendant bend forward, as if he were putting something on the floor. As the trooper approached the car, he saw that there were two men in the back seat, each with his hands in his lap, and two men in the front seat. The officer asked the driver for his license and registration, but the driver told the trooper he did not have his license with him. The driver stepped away from the car, and gave the trooper a name which matched the name on the car registration, and told the trooper that the front seat passenger could identify him. The trooper returned to the car to confirm the information. The front seat passenger produced identification and confirmed the driver's name.

While questioning the front seat passenger, the trooper saw an aluminum baseball bat sticking out from under the seat between the passenger's legs. He saw no other sporting equipment in the car. Remembering that another officer was recently beaten to death with an aluminum baseball bat during a routine traffic stop, the trooper became concerned for his safety. He called for backup, and asked the front seat passenger to step out of the car. The trooper conducted a pat frisk of the passenger and felt nothing to suggest a weapon. When the trooper returned to the car, the defendant, who was sitting behind the front seat passenger, was now clutching a boom box, which he did not have previously. Again concerned for his safety, the trooper requested that the defendant step out of the car, and attempted to conduct a pat frisk. Despite a request to place both hands on the trunk of the car, the defendant kept taking one of his hands off the trunk and clutching his jacket. The trooper felt what he thought was a weapon in the defendant's jacket. Because he could not locate the item he felt, he removed the jacket. Another trooper arrived at the scene and searched the jacket, finding a buck knife and many packets of heroin.

The defendant argued that the presence of the baseball bat was not enough to cause a reasonably prudent police officer to believe the defendant was armed and dangerous, and therefore that the frisk was unreasonable. The court held that, while the presence of the baseball bat, alone, may not have been sufficient to support a frisk, that factor, taken in combination with other factors, established the required reasonable apprehension about safety. The trooper was acting alone with four men in the car; there was no other sporting equipment visible in the car; the officer was conscious of the recent fatal bludgeoning of an officer with an aluminum baseball bat during a routine traffic stop; finally, the bat was underneath the seat in front of the defendant, who had looked around at the trooper as soon as he put his lights on, bent forward, as if to place something on the floor, had access to the bat, and placed a boom box in his lap, in the battery compartment of which a small weapon could have been concealed.

Probable cause to arrest established by observations of experienced narcotics officer. Commonwealth v. Santiliz, 413 Mass. 238 (1992). Members of the vice squad were conducting surveillance of a soup kitchen known to be a place of a high incidence of drug activity. An officer experienced in narcotics investigation, saw the defendant and Torrez sitting on the front porch. A taxi drove up. Torrez removed something from her waistband and handed it to the defendant. The defendant went to the taxi, and a woman got out. The defendant handed the object to the woman, who handed him money. There was no conversation, and as soon as the exchange was completed

the woman entered the taxi, which drove off. The defendant gave the money to Torrez. The officer concluded that he had just witnessed a drug transaction. Officers searched the defendant and found nothing, but found heroin and currency on Torrez.

The court noted that none of these observations, alone, would establish probable cause. While indicating that the case was close, the Court concluded that probable cause to arrest existed, noting four factors: 1) the unusual nature of the transaction-the taxi pulled up, the defendant took something from Torrez, walked to the cab and handed it to the passenger, who gave him money; 2) furtive actions-the object was hidden in Torrez's waistband, the exchange was done in silence; 3) the exchange took place in an area known for a high incidence of drug activity; and 4) an experienced officer considered the event to be a drug deal.

C. Terry Stops

Police not justified in stopping defendant based on general description which did not distinguish defendant from any other black male in area. Commonwealth v. Cheek, 413 Mass. 492 (1992). Police officers received a radio transmission advising them that there was a recent stabbing in the Grove Hall section of Boston, which is "a high crime area," and that the suspect was a black male, wearing a black 3/4 length goose jacket. The police saw the defendant, a black male wearing a 3/4 length goose jacket, walking 1/2 mile from the scene. They frisked him and found a gun, and arrested him after he could not produce a license to carry the gun.

The Court held that the police did not have reasonable suspicion to believe the defendant had committed the stabbing to justify stopping and frisking him. The Court noted that the description of the suspect as a black male with a black 3/4 length goose jacket could have fit a large number of men residing in the Grove Hall section of Roxbury, and the officers had no additional description of the suspect to distinguish the defendant from any other black male in the area. Moreover, although proximity to the scene of a crime is a relevant factor to consider, the fact that the defendant was 1/2 mile from thee scene, taken together with the other information, was not enough to support reasonable suspicion. Finally, the Court held that the fact that the defendant was in a "high crime area" did not distinguish the defendant from any other black male in the area, and the police may not conduct a broad sweep of a high crime neighborhood hoping to apprehend a suspect.

D. Inventory Searches

Cocaine found in paper bag during inventory search conducted pursuant to departmental policy properly admitted in evidence. Commonwealth v. Devlaminck, 32 Mass. App. Ct. 980 (1992). After making a routine arrest of the defendant for operating a motor vehicle while under the influence, and taking the only passenger into protective custody, the arresting officer impounded the vehicle and called for a tow truck, as directed by the departmental policy. This written policy also required the officer to make an inventory of the vehicle, and to open "all closed containers found in the vehicle that may contain personal effects." Before the tow truck arrived, the officer conducted an inventory search, listing the items on a scrap piece of paper. During the search, he found a paper bag on the floor in front of the driver's seat, opened the bag, and seized the packets of cocaine inside. At the station, the officer completed from his field notes the inventory form required by the department.

At the motion to suppress hearing, the defendant introduced evidence that suggested some officers did not inventory vehicles when required to do so, or failed to complete the required paperwork. The defendant also suggested that the officer in this case did not always secure the contents of closed containers by removing them to the station, as the policy required.

Nonetheless, the Appeals Court held that the inventory performed here was completed as the policy required. The court noted that the key issue was whether the policy required that items such as the paper bag be opened, not whether the officer filled out a proper report and followed every detail regarding the safeguarding of items properly found.

II. NARCOTICS OFFENSES

A. Suspension Of Driver's License

Suspension of driver's license following conviction of drug offense is constitutional. Rushworth v. Registrar of Motor Vehicles, 413 Mass. 265 (1992). The plaintiffs, three individuals whose licenses were suspended following their convictions for drug offenses, challenged the constitutional validity of G.L. c. 90, section 22(f), which requires the Registrar of Motor Vehicles automatically to suspend the driver's license of anyone convicted of drug offenses under G.L. c. 94C. The Registrar has established guidelines that provide for a one-year license suspension following conviction for simple possession, two years for possession with intent to distribute a class D or E substance, three years for possession with intent to distribute a class A, B, or C substance, and

five years for drug trafficking. The Registrar's guidelines also provide for early reinstatement in certain narrowly defined "hardship" situations.

The Court concluded that the statute is constitutional. It is rationally related to the legitimate state purposes of deterrence of drug use and prevention of impaired driving; it does not improperly discriminate between persons convicted of violations of drug offenses and those convicted of more serious crimes, between those convicted of drug offenses who possess drivers' licenses and those who do not, or between those who have access to public transportation and those who do not; and it does not violate the double jeopardy clause by punishing twice for the same offense since the legislature has the power to determine what punishment is to be imposed on a defendant's conviction, and has specifically authorized two punishments for drug convictions.

B. School Zone Statute

School zone statute is constitutional. Commonwealth v. Alvarez, 413 Mass. 224 (1992), Commonwealth v. Taylor, 413 Mass. 243 (1992). In these cases, the defendants were convicted of drug offenses and were found to have done so within 1,000 feet of a school. Pursuant to the school zone statute, the defendants each received a sentence on the underlying drug offense and a two year on and after sentence for violating the "school zone" statute. The "school zone" statute provides for a mandatory minimum sentence of 2 years for any person who violates G.L. c. 94C, §§32-32F, or 32I while within 1,000 feet of a school, to be served on and after the sentence received on the underlying narcotics offense.

In Alvarez, the Court held that the fact that a defendant does not know that he or she is within 1,000 feet of a school is not a defense. The Court also held that the statute is not unconstitutional for providing an additional penalty for the same criminal conduct, and that the requirement that the two year sentence run consecutive to the sentence imposed on the underlying drug offense does not rise to the level of cruel and unusual punishment.

In Taylor, the Court held that the "school zone" statute is not unconstitutionally vague since it clearly defines what acts are prohibited (possession of certain drugs with intent to distribute within 1000 feet of a school), and does not improperly discriminate against inner city drug dealers merely because there are more schools in the city than in a small town.

C. Forfeiture

Commonwealth held in contempt for failure to comply with order to return seized van where it took no steps to comply with order after federal authorities instituted forfeiture proceeding. Commonwealth v. One 1987 Econoline Van, 413 Mass. 407 (1992). In October, 1987, a van was seized in connection with an arrest on drug charges, and was taken to a storage facility shared by Federal and State authorities. The Commonwealth instituted forfeiture proceedings, and, on April 1, 1988, obtained an interim order to hold the van pending the outcome of the forfeiture proceeding. On April 6, 1988, the Commonwealth voluntarily dismissed the forfeiture proceeding, but did not return the van. The owner filed a motion seeking return of the van, and the Superior Court ordered that the Commonwealth return the van, but the Commonwealth did not do so. The owner then filed a complaint for civil contempt against the Commonwealth for its failure to return the van.

The Commonwealth claimed that it was impossible to return the van because it had been seized by Federal authorities. At the contempt trial, an officer testified that he did not learn of the order to return the van, which was issued on Friday, June 17, until it was too late in the day to retrieve the van, and that before he could retrieve the van on Monday, June 20, he was notified that Federal authorities had initiated an administrative seizure of the van. Following the contempt trial, the judge found the Commonwealth in contempt, and ordered that it return the van and pay attorney's fees, and if the van was not returned, to pay the value of the van, a civil penalty, and attorney's fees.

The Supreme Judicial Court held that, although a party may be excused from complying with a court order where compliance is impossible, in this case the Commonwealth did not establish that compliance with the order to return the van was impossible. The Court noted that the Commonwealth did not present any evidence that it took action to attempt to comply with the judge's order after learning that the Federal authorities had initiated a seizure of the van. The Court held that the basis for the Commonwealth's argument, that the Federal seizure created a legal barrier to compliance with the order, was incorrect. The court noted that where a State court first exercises jurisdiction over something, the state court can control the property and enjoin federal agents from taking custody of it. The Court also stated that the Commonwealth's argument that it should not be required to compensate the owner for the value of the van because, even if the Commonwealth had complied with the order and returned the van, the Federal authorities would have seized the van immediately thereafter, was purely speculative and properly disregarded by the Superior Court judge.

III. ADMISSIONS AND CONFESSIONS

A. Waiver Of Miranda

Juvenile did not validly waive Miranda rights. Commonwealth v. Philip S., 32 Mass. App. Ct. 720 (1992). Philip S., who was nearly thirteen years old, was interviewed by Lawrence fire officials about an arson fire in Lawrence. He was home alone when the fire started, and fire officials believed he might be involved. He voluntarily presented himself at the fire station with his mother and was interviewed in the presence of his mother by two uniformed fire officials and a plain clothes state police officer. When it became clear that the juvenile's description of the events did not make sense, the juvenile and the mother were advised of Miranda warnings; they both separately indicated they understood, and the mother signed the waiver provision on the Miranda card. The officers told the juvenile to tell his mother the truth and to tell the officers the truth, and then left. The mother and son were left alone for 10 minutes. The officers then resumed the questioning. When the juvenile was confronted with an inconsistency he became upset and ran from the room, and his mother brought him back for questioning. According to the state police officer, at this point the juvenile was the focus of the investigation. At the conclusion of the interview, which lasted for approximately an hour, one of the officers read the juvenile's statement to him and the juvenile and his mother signed the statement.

Two days later, a second interview was scheduled with different state police officers. Philip accepted a ride to the fire station from these officers. The juvenile and his mother were advised of the Miranda rights and individually waived those rights. They were given 10 to 15 minutes alone to discuss the rights. When the officers re-entered the room the juvenile and his mother signed a written waiver. A four hour interview took place, with a few breaks of varying duration. At the conclusion of the interview, the statements made by the juvenile were read, and signed by the juvenile and his mother. The juvenile left the station in the company of his case worker because the mother did not want to take the juvenile home with her.

The Appeals Court affirmed the Superior Court order allowing the juvenile's motion to suppress. The court held that the juvenile was in custody for both interviews. The court concluded that the focus on the juvenile as the suspect, in conjunction with the place of interrogation (the firehouse), and the aggressive and lengthy questioning, created a custodial situation. The court also concluded that the second interview was custodial because it lasted for four hours and was more intense than the first interview.

The court then concluded that there was no evidence that the juvenile waived his rights at the first interview because he did not sign the waiver provision and there was no other evidence of a valid waiver. The court held that, with respect to the second interview the court held that the Commonwealth failed to carry its heavy burden to demonstrate that the mother conveyed to the juvenile the information he needed to know to validly waive his Miranda rights.

The case has been taken by the SJC for further appellate review. Until there is a ruling from the SJC, it is advisable when interviewing juveniles under the age of 14 to obtain a written waiver from both the juvenile and the interested adult, and, after the adult and juvenile have had an opportunity to consult, determine from the juvenile that the juvenile and the adult have discussed the rights and the juvenile understood the rights and the waiver as explained by the adult.

B. Invoking Miranda Rights

Where defendant invokes right to counsel police can question further, without counsel present, following break in custody. Commonwealth v. Galford, 413 Mass. 364 (1992). Police wanted to question the defendant about a murder. When an officer approached the defendant in a shopping mall, the defendant dropped a plastic bag to the ground, and was arrested for possession of a class D substance and taken to the police station. A State police officer read the defendant the Miranda warnings, the defendant indicated he wanted to speak to the officers, then the officer began questioning him about the murder. During the questioning, the defendant requested a lawyer, and at that time all questioning ceased. The defendant was later released from custody.

Following further investigation, the police obtained an arrest warrant for the defendant for the murder. He was arrested and taken to the police station. There he was given his Miranda rights, and signed a written waiver. The defendant then made the statements which he sought to suppress.

On appeal the defendant claimed that the trial judge should have suppressed the statements he made to the police during the second interview because the questioning took place without counsel being present after he had invoked his right to counsel during the first interview.

The Court held that, under federal constitutional law, once a defendant is released from custody, the fifth amendment right to counsel ends, so that even if a defendant requests a lawyer, thereby ending questioning, the police are not precluded from further questioning of the defendant without the counsel present following the defendant's release from custody. Because the defendant in this case was released from custody

after he requested a lawyer, his later statements should not have been suppressed solely because he had asked for an attorney during his first interview. The Court noted that there was no allegation in this case that the break in custody was contrived or pretextual, and that it was not expressing an opinion as to the result in a similar case where the release from custody was contrived or pretextual.

IV. MISCELLANEOUS

A. Elements Of Crimes

Mother's knowledge of and acquiescence in boyfriend's rape of her daughter not sufficient to convict mother of being accessory before the fact. Commonwealth v. Raposo, 413 Mass. 182 (1992). The defendant's boyfriend told her that he intended to have sexual intercourse with the defendant's mildly retarded 17 year old daughter. The defendant did not discourage him from doing so even though she knew that her daughter did not want to have intercourse with the defendant's boyfriend. Following several instances of forced intercourse between the boyfriend and the defendant's daughter, the defendant reported the incidents to the police. The defendant was convicted of being an accessory before the fact to rape and indecent assault.

The Court reversed the conviction because, to be convicted as an accessory before the fact, the evidence must show not only knowledge of the crime and a shared intent to bring it about, but also some sort of act that contributes to its happening. Although physical participation is not necessary, the prosecution must show that the defendant aided, counselled, hired, or procured another person to commit the crime. A parent who fails to take action to protect a child, without more, cannot be convicted as an accessory before the fact, since the failure cannot be considered intentionally aiding in the commission of the felony against the child.

Defendant properly convicted of armed robbery when he took possession of weapon during the robbery. Commonwealth v. Dedrick, 33 Mass. App. Ct. 161 (1992). While a police officer was working undercover, the defendant got into her car, and began attacking the officer. In the ensuing struggle the officer and the defendant fell into the street, where they fought for control of the officer's gun. The defendant eventually took the gun and fled. That officer, and another who was nearby, chased the defendant and were both shot by the defendant using the first officer's weapon. The defendant was convicted on various charges including armed assault with intent to murder and armed robbery of the first officer for the theft of her weapon.

The defendant argued that since he was not armed until after he took the officer's weapon, he could not have committed the offense of armed robbery. The court rejected this argument, holding that when the defendant obtains a weapon at some point directly related to the commission and completion of a robbery, then the crime of armed robbery has occurred. Since the defendant took possession of the weapon during the robbery and used it to help effectuate his escape, he was properly convicted of armed robbery.

Defendant who stopped his truck near victim and told her to "get in" was not guilty of attempted kidnapping. Commonwealth v. Banfill, 413 Mass. 1002 (1992). The 13 year old victim testified that she was walking home from a store at approximately 5:30 p.m. when the defendant stopped his truck about three to five feet from her and asked directions to Summer Ave. The victim told the defendant that she did not know where Summer Ave. was. The victim testified that just as she was about to leave the area, the defendant told her to "get in." The victim did not remember whether the defendant said anything after that. The entire encounter lasted less than 25 seconds, and the victim testified that the defendant did not make a move toward her in any way, and did not open the truck door or display a weapon. The judge found the defendant guilty of attempted kidnapping.

The Appeals Court noted that the crime of attempt (G.L. c. 274, §6) requires both an intent to commit the underlying offense, and an overt act toward its commission. The Court reversed the defendant's conviction, holding that, even if the defendant's request for the victim was an overt act, the evidence did not establish that the defendant intended forcibly or secretly to confine the victim, as required by the kidnapping statute.

Bank that forecloses on residential property can not institute trespass action to remove occupants. Attorney General v. Dime Savings Bank, 413 Mass. 289 (1992). After foreclosing on various residential properties, Dime Savings Bank sent notices to the occupants demanding immediate possession of the properties. When the occupants refused to leave, Dime brought civil actions for trespass against the occupants, and received injunctions to eject the occupants. The Supreme Judicial Court held that a mortgagee who forecloses on residential properly may not bring a trespass action against the occupant of the foreclosed premises, but must rely on other remedies, such as summary process, to remove the occupants.

B. DNA Testing

Evidence of DNA match not admissible. Commonwealth v. Lanigan, 413 Mass. 154 (1992). The Commonwealth attempted to show that the defendant's DNA matched the DNA in semen found on clothing of the rape victim. To determine whether scientific evidence is admissible, the Court must determine whether the community of scientists involved generally accept the theory or process. In this case, therefore, the Court considered whether there was general scientific agreement as to the likelihood of a DNA match occurring. The Court concluded that there was insufficient agreement within the scientific community to allow conclusions concerning DNA matches into evidence. While DNA evidence can still be used to exclude a person from suspicion as a suspect, using such evidence to establish that an individual was the perpetrator will have to await further scientific studies in this area.

C. Use Of Evidence

Good faith, diligent, reasonable effort to locate missing witness, and not exhaustion of every lead, is required before prosecution can use prior testimony. Commonwealth v. Childs, 413 Mass. 252 (1992). The defendant was being retried after his conviction was overturned on appeal four years earlier. Shortly before the retrial, the police and assistant district attorney attempted to locate the critical witness. They determined that the witness had moved out of state. During a telephone conversation with the witness's father, who lived in Florida, the assistant district attorney learned that the witness was not in Florida but had been incarcerated in a particular facility in Pennsylvania. However, the jail in Pennsylvania was not housing the witness. A check for warrants with the National Records Bureau produced no leads. A credit check revealed possible addresses in Massachusetts, Florida, and South Carolina.

The Court held that the police and prosecutor made a good faith, diligent, and reasonable effort to locate the witness. The court noted that the prosecution was not required to exhaust every lead (for example, investigating the South Carolina address) before it could use the witness's prior recorded testimony. Since the prosecution established that the witness was unavailable, they could rely on a transcript of his testimony from the first trial.

This Supreme Judicial Court decision reverses a decision of the Appeals Court, summarized in the November 1991 Law Enforcement Newsletter, in which the Appeals Court held that the witness's testimony was not admissible because the prosecution had not made a sufficient effort to locate the witness.

Prosecution cannot introduce evidence that defendant refused to have hands swabbed for presence of barium and antimony. Commonwealth v. Lydon, 413 Mass. 309 (1992). At the trial of the defendant for murder and unlawful possession of a firearm, the prosecution introduced evidence of the defendant's refusal to allow the police to swab his hands to test for evidence of barium and antimony, which would indicate whether he had recently fired a gun. Although the defendant has no right to refuse to take the test, the Court held that it was error to introduce evidence of the defendant's refusal to take the test, since that evidence was offered to show that the defendant had doubts as to his ability to pass the test, and therefore violated his privilege against self-incrimination.

Officer's diagrams of accident scene can be used by defendant to impeach officer's trial testimony. Commonwealth v. Donnelly, 33 Mass. App. Ct. 189 (1992). At the defendant's trial for motor vehicle homicide, the judge excluded three diagrams drawn by a state trooper during his investigation of the accident which the defendant sought to introduce. The diagrams depicted the tire marks from the defendant's car and supported the defendant's version of how the accident occurred. In his testimony before the grand jury, the trooper had referred to the diagrams and presented at least one of them to the grand jury. At trial, the trooper stated that the diagrams were not fair and accurate representations of the accident, but were drawn for his own use. The trial judge therefore refused to allow the diagrams into evidence.

The Appeals Court reversed, holding that the diagrams were admissible to impeach the trooper's trial testimony, and, if used in the grand jury, were admissible for probative purposes.

ASSISTANCE AND CONTACTS AT THE OFFICE OF THE ATTORNEY GENERAL

Below is a list of individuals at the Office of the Attorney General who you can contact for assistance. The main office number for all persons listed below is (617) 727-2200. The office address is: Office of the Attorney General, 1 Ashburton Place, Boston, MA 02108.

	Ext.
Scott Harshbarger, Attorney General	2042
Thomas Green, First Assistant	2057

CRIMINAL BUREAU

Edward Rapacki, Bureau Chief	2810

Susan Hicks Spurlock, Deputy Bureau Chief

Michael Cassidy, Deputy Bureau Chief

Pamela Hunt, Chief, Appellate Division

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Mark Smith, Chief, Public Integrity Division

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Lt. Jack Kelly, Chief,
Criminal Investigations Division

Martin Levin, Chief, Environmental Strike Force

Michael Kogut, Chief, Medicaid Fraud Control Unit

Brian Burke, Chief,
Division of Employment & Training.....727-6824

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Barbara Anthony, Bureau Chief

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GOVERNMENT BUREAU

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LAW ENFORCEMENT NEWSLETTER

LaDonna Hatton, Editor

MASS. AG. 1.12: 2/3

Law Enforcement Newsletter

FROM THE OFFICE OF THE
Attorney General
For The Commonwealth of Massachusetts

Scott Harshbarger
Attorney General

GOVERNMENT DOCUMENTS
COLLECTION

Contact:(617)727-2200

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Letter from the Attorney General

Violence Prevention: Stopping the Problem Before It Starts

March, 1993

To Members of the Law Enforcement & Criminal Justice Community:

I. Introduction

I have completed two years in office and am very pleased with our accomplishments. I believe that we've invigorated and professionalized the office, and, working through my major affirmative priorities -- fighting fraud, protecting the elderly, reforming health care and combatting urban violence -- I feel that I have been an Attorney General for the entire state.

In this issue of the Law Enforcement Newsletter (LEN) I would like to look at violence and the prevention of violence in our communities and what we, as law enforcement professionals, can do about this critical issue.

Crime and the fear of crime affect each and every one of us every day. As we all know, both as individuals and as prosecutors, police or civic leaders, crime and the fear of crime sap our energy, our resources and our peace of mind.

And it isn't just the urban violence of guns, gangs and drugs that plagues our state. One of the most damning indictments of our violent society was the recently published list of all the fatalities connected with domestic violence during this past year - 26 women and 18 children and bystanders were killed in 1992 alone because of domestic violence - showing once again that you are more at risk of becoming a victim of violence in your own home at the hands of someone you know than of random violence at the hands of a stranger on the streets.

Violence in all of its forms is not limited to any particular class or locality. It affects every city, every town, every neighborhood.

As Attorney General, I see my role in fighting violence and victimization as two fold. On the first level I'm working to help members of law enforcement fight the traditional battle against violent crime by joining and supporting efforts to increase and vary the tools available to them: through legislation, funding, and additional prosecutorial resources. But, just as importantly, on the second level I am working with community leaders, mediators, and students to try to stem the violence through violence prevention programs.

II. Level One: Giving Law Enforcement the Tools It Needs

The police, district attorneys, the courts and corrections do the difficult, often dangerous task of fighting the day-to-day battle against violence in Massachusetts. Your job is to investigate, arrest, prosecute and incarcerate. The men and women in law enforcement in Massachusetts admirably and professionally carry out their often thankless jobs under difficult circumstances.

One leadership role of the Attorney General is to help ensure that the tools are there to fight that battle. That means proposing and pushing legislation that will help law enforcement. In this past session several proposals that I sponsored or strongly supported received approval from the legislature.

The Stalking Bill and the Domestic Violence Registry Bill became law in 1992. After a non-partisan, collective push in which I joined the District Attorneys, the Massachusetts Chiefs of Police, the Governor and the Lt. Governor, the legislature also enacted the Bail Reform law to add "dangerousness" as an explicit factor in bail determination. It is my sincere hope that those laws will help protect women from domestic violence and help prosecutors if a crime is committed.

Court Reform also, at long last, became a reality this year. For all of us who care about victims and swift, fair and equal justice, there was no more important piece of legislation this past session.

In addition I have sponsored and fought for a whole package of legislation that will give law enforcement the tools we need to help fight modern crime more effectively and efficiently,

including: bills providing for a statewide grand jury; grand jury immunity; sentencing reform and amendments to the money laundering and wiretap statutes.

In addition to legislation, I have directed prosecutorial resources where I felt they could do the most good. I have dedicated eight Assistant Attorneys General to work full-time in the overcrowded urban courts of the Commonwealth to help several District Attorneys prosecute serious gun, gang and drug cases. Assistant AGs from my office have worked in Middlesex, Suffolk, Plymouth, and Essex counties.

III. Level Two: Violence Prevention

As the chief law enforcement officer and as someone who has spent his entire professional life in law and law enforcement, I believe that we must go beyond the traditional emphasis on protection and punishment -- beyond the simple solutions of longer prison sentences and more jails. Law enforcement alone will not solve the problem. We must focus our ideas and energy on prevention. Violence prevention -- stopping the problem before it starts -- is cheaper, more efficient and just as important a part of public protection as law enforcement. A proactive, preventative approach is where I want to focus because if we aren't getting to the root of the problem, all of us in law enforcement become a finger in the dike, a "thin blue line" trying to protect society from itself.

In the violence prevention battle there are three efforts that we are making and must continue to make:

1. Being innovative in our approach and our use of resources;

2. Changing behavior -- especially in our schools through our Student Conflict Resolution Experts ("SCORE") violence mediation programs; and

3. Getting new players involved -- for example in our urban centers to deal with the special problems of urban violence.

1. Innovative Approaches

Violence prevention requires us to look at an age old problem in new ways and challenges us to try new solutions - solutions that aim not to solve crimes or to punish criminals

after the damage is done but to prevent the harm to victims in the first place.

We have to get to the cause, the root, of the problem and address it in a community-wide, multi-disciplinary approach. My experience as a prosecutor tells me that is the best method of public protection.

Obviously, some solutions to violence in our society are easy to point to. We need to eradicate the problems that lead to violence such as: poor education; lack of jobs and the concomitant lack of hope; drug and alcohol abuse; the breakdown of the family; and the deplorable lack of morality in our society, including some of our business leaders and elected and appointed officials.

But until we achieve the millennium, there are specific steps that we can take. Part of the solution will require putting some of our scarce resources up front. But in law enforcement as in so many other governmental ventures, we can pay now or we can pay more later -- but pay we must.

2. Violence Prevention in the Schools: SCORE

One of the places where my office has taken specific steps regarding violence prevention is in the schools to change the attitudes and behavior of students towards violence.

We have done this in two ways: with the Student Conflict Resolution Experts, or "SCORE", programs and through Project Alliance.

SCORE is a program in which high school and middle school students are trained in mediation and then, with supervision from a trained mediator, work to resolve disputes between students at their schools before they explode into acts of violence. The student mediators bring the opposing sides together and have them talk rather than fight. At the end of successful mediations, those two sides sign an agreement dictating their future conduct and promise not to use violence to solve their problems. My office is now funding, in part, 15 SCORE programs in Somerville, Worcester, Springfield, Lowell, Medford, Boston, and Fall River.

The success of the SCORE program has been phenomenal. The student mediators have an almost 100% success rate with their mediations. Violent attacks have been avoided and the agreements brokered by the mediators have been honored. Just

as importantly -- and this is where we start to reap the extra benefits of violence prevention programs -- the students have found that they are using their new mediation skills in their personal and home lives to avoid violent conflict.

The recent events at Medford High School have dramatized the importance of SCORE. As you are probably all aware, a dispute fueled by racial tensions erupted into a violent disturbance at the High School. For students' safety and the security of all, the school was closed and remained so for a week. During this time, our Office offered immediate help to reopen the school safely and to lay the foundation for a non-violent conflict resolution approach to reducing tensions and antagonisms.

We organized and provided a team of 38 volunteer mediators who worked with the entire student body, faculty and administrators to reduce tensions, allay anxieties, and to set in motion permanent mechanisms to resolve difficult conflict at the school using SCORE and other programs. In Medford, we were able to provide an emergency response to a volatile situation. We are hopeful that the SCORE program, diversity awareness training programs and other positive changes which we have recommended to school officials will effectively preclude further serious student violence.

Medford was a wake-up call to some school systems; to others, it simply underscored their volatility and potential for violent upheaval. The work we did in Medford demonstrated the critical importance of using methods outside of the courts and the police to restore safety to a system and to institutionalize non-violent methods of conflict resolution.

Project Alliance is our other violence prevention program in the schools. As prosecutors and police, we see violence at the end of the line, after someone has been victimized and an arrest has been made. I started Project Alliance when I was a District Attorney as a forum for school superintendents to get together with prosecutors and police to discuss drug and alcohol abuse, school violence and all of the issues that involve law enforcement and educators.

The hope was that if we can be proactive, for instance in educating young women about dating violence, we will not have to be reactive later, for example, in responding to a deadly domestic violence situation. I am hoping to establish Project Alliance as a statewide initiative.

I believe these programs are especially important because they are in the schools, educating our children while they are young. Education is a crucial piece of any crime prevention or public protection program. And the fact of the matter is we can start paying a little more than $5,000 a year to educate students now, or we will be paying $26,000 a year to incarcerate them as inmates later on.

3. Getting the Community Involved: Urban Violence Conference

Project Alliance is also an example of another way that my office is working to prevent violence: by involving groups that otherwise would not see themselves as working with law enforcement in violence prevention. Another instance of that is the effort that my office is making with regards to urban violence.

I sponsored a statewide conference on urban violence this past year at which we brought together police and prosecutors, mayors, clergy, members of the media, educators, businessmen and community leaders to discuss the problem and to offer a model for them to follow. The goal of the conference was to get members of the community to start thinking about the role each of them play in their city and how a cooperative effort among the different groups might lead to solutions to violence.

I have followed up on the conference in New Bedford, Worcester, Fall River, and Springfield, and will do the same in Taunton in the coming weeks. What we have found is that the problem of urban violence may be different in each city. In one city the problem might be gangs and drugs, in another it might be arson, in a third it might be school racial violence. Therefore, each community must define its own problem and determine its own solutions.

One of the biggest benefits we have found from the conference was that it has brought a lot of worthwhile programs that were already in existence to light and that people are starting to talk about solutions. My office is compiling a resource manual and a newsletter in order to maximize communication and to promote networking and minimize 'reinventing the wheel' in each community.

We have found that it is not a question of simply having more police and more jail space in order to stop the violence. It is also a matter of finding the people who are already doing something about violence prevention, making sure that they are

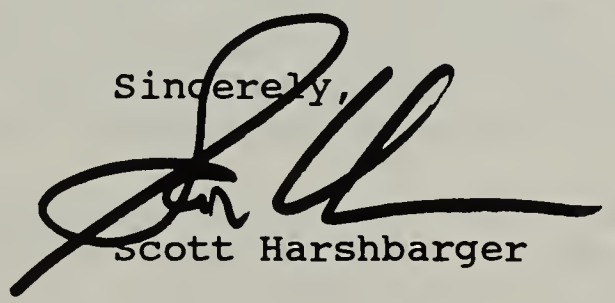
talking to the others who are doing preventive work, and getting the people who could have an impact, but, as of yet are not, playing a role in the game.

IV. Conclusion

As always, I welcome your comments and your ideas on ways to help solve this problem. There is no city or town in the Commonwealth that doesn't have a violence or potential violence problem. Therefore, I have been travelling the state, encouraging local community leaders to be innovative, to get local business funding, to start a program to educate the children in their communities about violence prevention.

Doing so will not make violence a thing of the past here in Massachusetts. There are no simple solutions or magic panaceas to complex problems. But it would be a first step towards lessening the pain, suffering and tragedy that occurs far too often in our communities.

Sincerely,



Scott Harshbarger

AG SPONSORED SEMINARS

In addition to the urban violence conference referenced in the Letter from the Attorney General, the AG's Office also co-sponsored seminars on environmental enforcement and insurance fraud.

ENVIRONMENTAL ENFORCEMENT CONFERENCE

Attorney General Scott Harshbarger and the Department of Environmental Protection sponsored a Local Environmental Enforcement Conference on November 14, 1992. More than 300 Conservation Commission and Board of Health members, city and town counsel and health agents attended. The Attorney General gave the opening remarks.

A variety of environmental experts gave presentations on hazardous waste, asbestos, water pollution, solid waste, and wetlands. The program also featured a panel discussion on enforcement options, case studies, and a luncheon presentation by an expert from Massachusetts Water Resources Authority.

With the assistance of a Massachusetts Environmental Trust grant, comprehensive resource manuals were made available to all participants at the conference. If you are interested in purchasing a manual, the fee is $30. Manuals are available at the AG's office; please call Sheila Martin at 617-727-2200 to place an order.

INSURANCE FRAUD SEMINAR

On November 13, 1992, the Attorney General and the Insurance Fraud Bureau jointly sponsored a seminar on Prosecution of insurance fraud cases. The seminar, held in Braintree, was attended by over three hundred representatives from police departments, law firms, insurance company special investigation units, and representatives from the Insurance Fraud Bureau and Worker's Compensation Rating Bureau. Speakers focused on the economic impact of fraud on insurance rates and on the difficulties in investigating and prosecuting fraud cases. Assistant Attorneys General from the Criminal Bureau of the AG's Office spoke about the burden of proof facing prosecutors and offered suggestions to insurance company investigators and law enforcement officers on how to meet the challenge inherent in such cases. The seminar was originally expected to attract two hundred participants but the widespread

response to invitations resulted in an overflow crowd and a very productive discussion. Both the Attorney General and the Insurance Fraud Bureau look forward to more seminars in the future to encourage continued emphasis on the prosecution of insurance fraud cases.

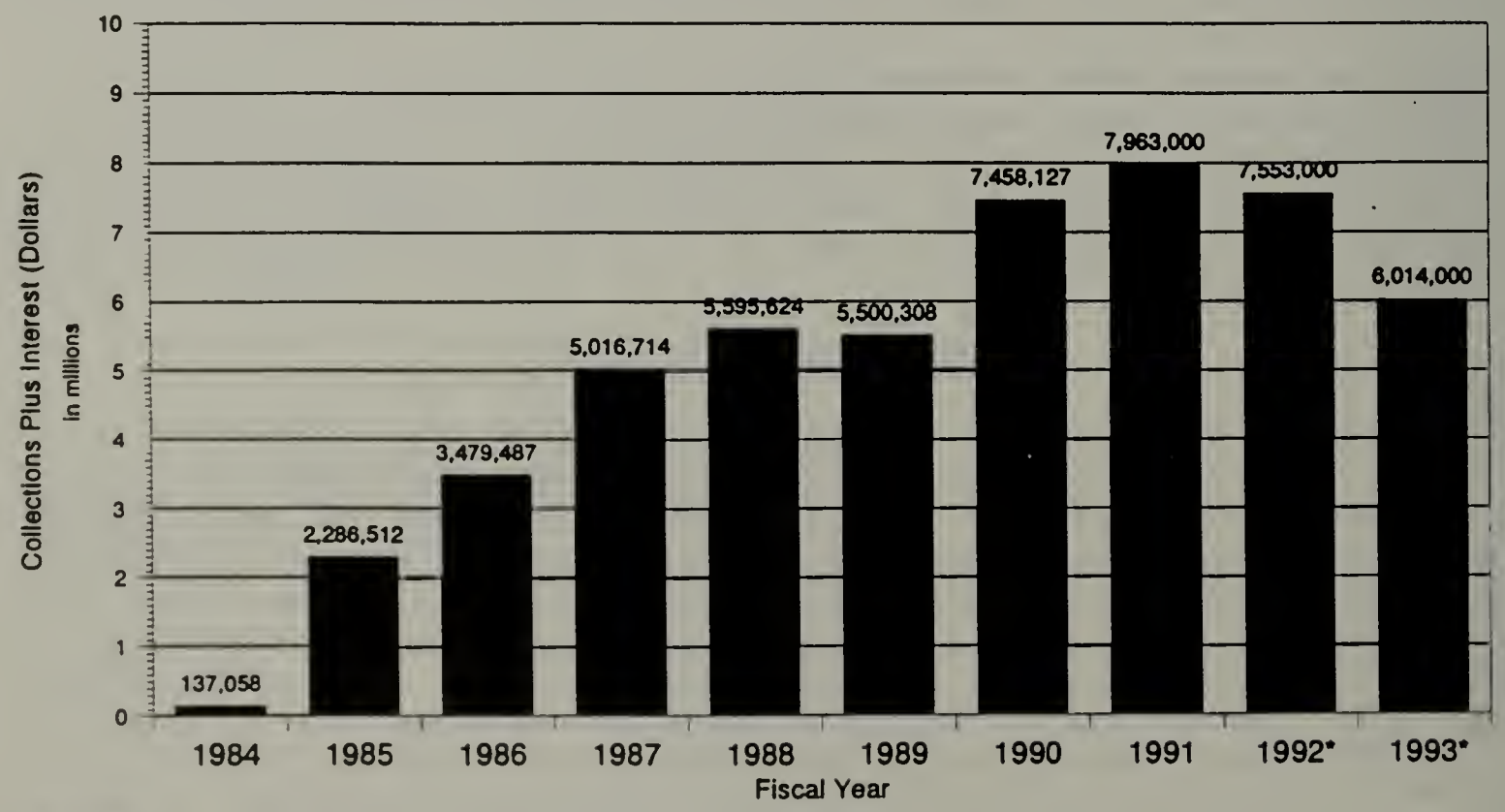
The Attorney General distributes a newsletter designed to report on efforts taken to eliminate fraud in the Commonwealth. To receive a copy of the newsletter, AGenda Fraud, please call Erin O'Sullivan, Publications Coordinator, at 727-2200 ext. 2674.

RAISING REVENUE FOR VICTIM ASSISTANCE

by: Shelagh Lafferty, Policy Analyst,
Massachusetts Office for Victim Assistance

The Victim and Witness Assistance Fund was established by statute in 1983 to provide funding for the Commonwealth's eleven Victim Witness Assistance Programs and the Victim and Witness Assistance Board. By 1991, the Fund was generating almost eight million dollars a year to support services to crime victims through penalty assessments against convicted criminals and late fees attached to civil motor vehicle violations. Over the last two years, however, revenues generated for the Fund have dropped by 25% -- an alarming decrease which seriously jeopardizes the current level of services provided to crime victims. (See Table below.)

VICTIM AND WITNESS ASSISTANCE FUND
Revenue: FY1984 to FY 1993*



* Estimates

December 31, 1992, MOVA

The revenues generated through victim witness assessments are vitally important in protecting the rights of crime

victims. Victims of domestic violence, child abuse and sexual assault, as well as the families of homicide victims, are but a few of the people who are helped every day by victim advocates working in the Attorney General's Office and in the District Attorneys' offices across the state. Among a host of other important responsibilities, advocates apprise victims of their rights, help them to navigate a confusing criminal justice system, and provide them with ongoing emotional support during what is often a very traumatic experience in their lives. Very often, the advocate is the first person a crime victim encounters in the criminal justice system after the crime has occurred and is sometimes the only person in the system a victim feels he or she can trust.

Last month, the Massachusetts Office for Victim Assistance (MOVA) issued its final report on the status and future of the Victim and Witness Assistance Fund. The report estimates that the level of victim witness fees currently being collected is at least $3 million less per year than statistics indicate could be assessed and collected. The report also highlights a number of administrative and systemic problems which have impeded full assessment and collection of victim witness fees. However, the points in the process which have been most vulnerable to lapses and oversights are also ones which can be remedied most easily.

The major findings of the report include:

1. Lack of Clarity About Fund Process and Purpose

One of the fundamental issues underlying the current revenue crisis pertains to a system-wide lack of clarity about how the assessment and collection process is supposed to operate. Too often, this confusion has left important tasks and functions incomplete or not attended to. To address this problem, MOVA has developed information sheets about the victim witness fees, along with guidelines for judges, prosecutors, and other relevant players in the system which answer commonly asked questions and clearly delineate each organization's responsibilities in the process.

Specifically, judges are required by law to impose the victim witness fee assessment in all criminal convictions as part of the sentence, except where the imposition of the fine would create a "severe financial hardship" for the defendant (G.L. c. 258B, § 8). Judges may also order reduced fee amounts if a full waiver is not warranted. The current assessment

levels are:

-- not less than $50 per felony for adult offenders

-- $30 per misdemeanor for adult offenders

-- $30 for juvenile delinquents over age 14

2. Indigency Waivers Are Issued Too Frequently

The report notes that the "severe financial hardship" exemption in the statute is the major loophole through which convicted offenders escape paying the victim witness fee. Despite the small dollar amount of the fee, it is estimated that judges waive the fee in more than 50% of all cases. Although the recession of the past two years may have contributed to higher indigency levels, it certainly does not explain the high rate of victim witness fee waivers.

Part of the waiver problem stems from the lack of clear, uniform standards about when a defendant does or does not qualify as indigent for purposes of assessment of the victim witness fee. The vagueness of the term "severe financial hardship" has too often resulted in it being interpreted to mean that whenever a defendant has court-appointed counsel (i.e., cannot afford private legal counsel) the victim witness fee should be waived. This is not and should not be the basis for a victim witness fee waiver. The issue before the court is whether the assessment of the $30 or $50 victim witness fee would create a "severe financial hardship" for the defendant. All players involved in the assessment stage of the process should keep this important distinction in mind when making determinations of financial hardship.

In addition, it was noted in the report that waivers were sometimes recorded as a result of silence -- that is, if the judge did not affirmatively impose the assessment, it was interpreted by the clerks and the ADAs to have been waived. Moreover, the report notes that when waivers were issued without a clear showing of indigency, prosecutors seldom challenged or opposed the decision by the judge. Clearly, prosecutors have an interest in recommending victim assessments since those revenues are used to fund Victim Assistance Programs in their offices.

3. Assessments Not Imposed or Collected for Incarcerated Offenders

The incarceration of offenders has posed two problems for

the Victim Witness Fund. First, increasingly judges have elected not to impose fines on defendants who are incarcerated. The main rationales offered for not imposing the fine on the incarcerated offenders include concern for the offender's dependents who may be deprived of the offender's earnings and a belief that imprisonment itself constitutes sufficient penalty.

The second problem has been that if an assessment is ordered but is not collected before the offender is remanded into custody, the mechanism for collecting the assessments during incarceration does not yield the expected results. Ideally, an offender sentenced to a period of incarceration should be ordered to pay the victim witness fee immediately, but other options do exist for collecting payment if the judge determines that immediate payment is not appropriate. However, judges must specifically indicate on the mittimus that payment of the victim witness fee has been deferred to a date certain or ordered to be made in installments. Many inmates have personal financial accounts in prison or perform work for which they receive wages, portions of which can be applied to payment of the victim witness fee. Without explicit directives, however, sheriffs and corrections officials do not feel that they are authorized to collect payment of the victim witness fee from inmates.

4. <u>Lack of Enforcement Fosters Assessment Default</u>

The report indicated that convicted offenders have defaulted on payment of the victim witness assessment at higher rates during the past two years than during previous years. The rising default rate reflects a lack of enforcement of the offender's obligation to pay the fee through the imposition of additional punitive measures for the failure to pay. Aside from the revenue implications of this high rate of defaults, the lack of enforcement of a convicted offender's obligation to pay the victim witness fee sends the wrong message to victims and their families about their importance in the criminal justice system.

When the victim witness fee assessments are not ordered, paid, or enforced, and convicted criminals escape part of their punishment and obligation to victims, it reinforces the too common perception that the system protects criminal interests over victim interests.

5. No Sustained, Comprehensive Program to Increase Revenues

Despite the enormous efforts that have been invested by individuals throughout the criminal justice community in trying to fully assess and collect victim witness fees, no comprehensive revenue enhancement program has been implemented on a long-term, statewide basis. Positive corrective measures which have been recommended by individuals affiliated with the collections process have only been partially implemented, if at all, or have been designed to meet short-term needs.

For example, although the Victim and Witness Assistance Fund realized steady increases in revenue collections in previous years, much of that expansion resulted from a statutory increase in the fee amounts in 1989. Thus, although the fee increase meant that total collections amounts rose, total collections levels have actually remained the same or decreased. Unwittingly, the increased fee masked the systemic problems which continue to hamper our current efforts.

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MOVA is attempting to address and remedy these and other systemic problems. Toward that end, a number of worthy initiatives have been started, including the development of a data collection system to track monthly revenues in each court, the revision of procedures for analyzing revenue performance by court and by county, and the establishment of a year-long education campaign to increase awareness about the importance of the victim witness fees.

The criminal justice system has seen the difference a solid, professional performance can make and what joint effort can accomplish on a short-term basis. In the past, counties that have waged aggressive campaigns to increase victim witness revenues have met with resounding success. The challenge ahead lies not only in meeting our immediate revenue needs, but in sustaining our collaboration on this issue for the long run.

The real victims of not fully assessing or collecting the fees are, unfortunately, the victims of crime. The revenues generated from victim witness assessments fund victim advocates in the court. Victim advocates not only help individual crime victims, but also facilitate the efficient processing of cases in the courts. The connection between victim assessments and advocates is a crucial one that cannot be underestimated or overlooked.

Everyone in the criminal justice community should do what they can to help remedy this problem. A little more effort and awareness about the purpose of the victim witness fees can have a genuine and lasting impact on the courts.

JUVENILE HATE CRIMES SENTENCING PROJECT*

There is a unique and highly successful supplemental sentencing option for juvenile defendants charged with violation of the Massachusetts hate crime laws, or other offenses in which there is evidence of racial, religious, ethnic, or homophobic bias or discrimination. The project, conducted under the auspices of the World of Difference Project of the Anti-Defamation League of B'nai B'rith ("ADL"), accepts, presently at no charge, juvenile defendants referred to it under court order and engages them in an intensive 10-week program designed to enable them to confront and overcome the prejudices that fuel their hate crimes and other bias-related conduct.

This project, which is the result of a collaborative effort between ADL and the Civil Rights Division of the Attorney General's Office, grew out of the realization that while the Massachusetts hate crimes laws provide powerful tools for sanctioning civil rights offenders and protecting victims of racial, religious, ethnic, and homophobic harassment, they do not and cannot provide the impetus for offenders to change the attitudes that lead to their conduct. This shortcoming is particularly glaring in the case of juvenile offenders. Experience shows that juvenile civil rights offenders, in contrast to their adult counterparts, frequently act out of ignorance rather than deeply held or unchangeable attitudes about people who they perceive as different. With the appropriate exposure, counseling, and support, their attitudes can be changed and their worlds immeasurably broadened. However, without positive, constructive intervention, racist attitudes that have been learned in childhood easily become entrenched and virtually unchangeable, regardless of the degree of punishment to which the juvenile offender is subjected. The long term social costs are enormous.

With these concerns in mind, over the past several years the Attorney General's Office has obtained court orders requiring several juvenile defendants to participate in the ADL project as a condition of resolving cases brought pursuant to the civil injunctive provisions of the Massachusetts Civil Rights Act, G.L. c. 12, §11H. ADL engaged the juveniles in an

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* This article is adapted from a letter sent to all District Attorneys by Attorney General Harshbarger.

intensive program of education, community service, journal-writing, and public speaking. The results were astounding. In each case, the juveniles who were referred to the pilot project had engaged in repeated incidents of racial and religious harassment and vandalism. After participating in the program, they each understood, probably for the first time, what was wrong about their actions. This outcome fundamentally strengthened the quality of the system's response to their conduct. It clearly changed the juvenile defendants involved.

As a result of the early success of this pilot project, Lotus Corporation has provided ADL a small grant to enable the project to expand. This presents a unique opportunity which should be taken advantage of. The following guidelines are suggested so as to maximize the effectiveness of the project:

1. At this stage, the program is limited to juvenile defendants who are charged with bias-related offenses and harassment, including violations of G.L. c. 265, §37; G.L. c. 265, §39; G.L. c. 266, §127A; G.L. c. 272, §98; and G.L. c. 12, §§11H-J.

2. Court-ordered participation in the program should be considered as a sentence enhancement or a condition of probation. Participation should not be considered as an alternative to commitment where the facts and the juvenile's history otherwise support commitment to DYS. Participation should not be viewed as a means of avoiding commitment, but as a means of ensuring that the disposition of the court includes the greatest possibility of real reform and rehabilitation.

3. Prior to seeking a court-ordered referral, please consult with Assistant Attorney General Judith Beals, the coordinator in the Attorney General's Office for this project. This will help ensure that, as this project gets off the ground, it is receiving the appropriate number and type of cases. Attorney Beals can be reached at (617) 727-2200. You may also consult with Ann Watt, the project coordinator at ADL, (617) 330-9696.

If appropriately supported and utilized, this project will become a national model for stemming the tide of juvenile hate crimes.

VIDEOTAPING PUBLIC DEMONSTRATIONS BY LAW ENFORCEMENT PERSONNEL

by: Peter Sacks, Assistant Attorney General

INTRODUCTION

The Attorney General has recently received several inquiries regarding the extent to which law enforcement personnel may make videotapes, with or without audio recording, of demonstrations in public places. The short answer is that videotaping is appropriate under certain limited circumstances; that audiotaping is appropriate in the same circumstances so long as it is not done "secretly"; and that the use of good judgment and common sense will go a long way toward determining when these information-gathering and evidence-preserving techniques should and should not be used. Some of the governing legal principles are set forth below.

SEARCH AND SEIZURE LAW

The question of videotaping public demonstrations does not appear to raise any significant issues under the search and seizure provisions of the federal and state constitutions or under the privacy protections set forth in G.L. c. 214, § 1B. Generally, persons demonstrating in a public place do not enjoy a reasonable expectation of privacy.

ELECTRONIC EAVESDROPPING LAW

So long as no audio recording is made, such videotaping would not violate the Commonwealth's eavesdropping and wiretapping statute, which restricts interceptions of "wire communications" and "oral communications" but not communications made by means of visible images. G.L. c. 272, § 99. Even an audio recording would not violate the statute if it were made openly, in light of the statutory definition of "interception" as a communication heard or recorded "secretly." Id. § 99 B.4. A recording made "secretly," unless otherwise authorized by the statute, is a criminal offense, id. § 99 C.1, and may be the basis for monetary damages. Id. § 99 Q.

Whether a recording is being made "secretly" will depend in part on individual facts and circumstances. For example, a

large boom microphone might put a reasonable person on notice that an audio recording was being made, but a small camcorder may be less noticeable in a crowd. Also, depending on the relative prominence of the microphone on the particular model of camcorder, even a person who saw the camcorder being operated might not necessarily be aware that an audio recording was also being made. A court might also consider such factors as whether the recording was being made in the open, or instead from within a building or an unmarked vehicle, and whether the officer making the recording was in uniform or plainclothes.

FAIR INFORMATION PRACTICES ACT

District attorneys, State Police personnel, and law enforcement personnel employed elsewhere in the executive branch of state government or by independent authorities must consider certain issues under the Fair Information Practices Act (FIPA), G.L. c. 66A, §§ 1-3. FIPA provides that a "holder" maintaining "personal data" must "not collect or maintain more personal data than are reasonably necessary for the performance of the holder's statutory functions." G.L. c. 66A, § 2(l). Any holder violating this or any other provision of FIPA may be liable for damages and subject to injunctive relief under G.L. c. 214, § 3B. Whether FIPA is applicable here depends on whether the office or law enforcement agency involved is a "holder," whether the information captured on videotape or audiotape constitutes "personal data," and whether that information is "reasonably necessary for the performance of the holder's statutory functions."

The term "holder" is defined by using the term "agency," which in turn is defined as including "any agency of the executive branch of government . . . or any authority created by the general court to serve a public purpose, having either statewide or local jurisdiction." G.L. c. 66A, § 1. Although no reported case has addressed the issue, a district attorney could be held to fall within this definition. Cf. Lodge v. District Attorney for the Suffolk District, 21 Mass. App. Ct. 277, 281 (concluding that office of district attorney is a state agency for purposes of presentment of tort claims under G.L. c. 258, § 4), rev. denied, 396 Mass. 1106 (1985). The State Police, other state law enforcement agencies, and independent authorities would also appear to constitute "holders."

The term "personal data" is defined, see G.L. c. 66A, § 1, so as to exclude "intelligence information" as defined in G.L. c. 6, § 176; "intelligence information" is defined as including

records and data compiled for the purpose of "criminal investigation" or "investigating a substantial threat of harm to an individual, or to the order or security of a correctional facility." G.L. c. 6, § 176. Accordingly, information could be "personal data" for FIPA purposes if it were gathered for purposes other than a criminal investigation or the investigation of a substantial threat of harm to an individual or correctional facility.

The phrase "reasonably necessary for the performance of the holder's statutory functions" is not one that is susceptible to any single, precise definition. Law enforcement personnel have numerous statutory functions, and in each instance a judgment would have to be made, based on all of the facts and circumstances, as to whether particular data was "reasonably necessary" to the performance of one or more of those functions. It seems likely that a court would allow law enforcement personnel a range of discretion in determining what kinds of data are "reasonably necessary" to gather, but such discretion would not be unlimited.

The result of the foregoing is that, although certain legal questions remain to be resolved by the courts, law enforcement officials subject to FIPA should make videotapes of public demonstrations only where such videotapes are either (a) for purposes of a criminal investigation or the investigation of a substantial threat of harm to an individual or correctional facility, or (b) are "reasonably necessary for the performance of [the law enforcement agency's] statutory functions." G.L. c. 66A, § 2. The making of videotapes for other purposes could be grounds for monetary and injunctive relief under G.L. c. 214, § 3B, although such relief would operate only against the "holder," i.e., the agency or authority, rather than against law enforcement personnel individually. See Torres v. Attorney General, 391 Mass. 1, 14 (1984) (noting that relief under FIPA should operate against agency that is "holder," rather than any individual employee).

MASSACHUSETTS CIVIL RIGHTS ACT

All law enforcement personnel should consider issues under the Massachusetts Civil Rights Act (MCRA), G.L. c. 12, §§ 11H, 11I. The MCRA makes any "person" who interferes or attempts to interfere with the protected rights of another person "by threats, intimidation or coercion" subject to civil liability and injunctive relief. The holding of a peaceful demonstration in a public place, in compliance with any lawful time, place, and manner restrictions, is a right protected by the federal

and state constitutions. The videotaping of such a demonstration in a threatening, intimidating, or coercive manner, or in circumstances where the act of videotaping was inherently threatening, intimidating, or coercive, could constitute grounds for liability under the MCRA.

One factor that a court might consider in evaluating any claim of an MCRA violation is whether there was a videotaping policy that was even-handedly applied to all demonstrations regardless of the content of the messages being conveyed at the demonstration, or instead whether the decision to tape a particular demonstration took the subject of the demonstration into account. It may be, of course, that some demonstrations dealing with particular issues might present a relatively greater or lesser threat of illegal conduct than the typical demonstration. If there were some objective evidence for such a correlation, then such evidence could be taken into account in deciding whether to videotape the demonstration. But the subject matter of the demonstration, standing alone, should not be a factor in the decision.

Also, there is an unanswered question as to whether it would be more appropriate for the officer making the recording to be in uniform or plainclothes. Conceivably, this could bear on the issue whether the officer's activities would constitute an interference with the demonstration by means of "threats, intimidation, or coercion." In particular, some members of the public might view videotaping by a uniformed officer as expressive of particular governmental concern about the demonstration and therefore more intimidating. Others might view videotaping by a plainclothes officer as more intimidating because participants in the demonstration are left to wonder who is videotaping the demonstration and why.

These decisions must be made based on the facts and circumstances of each particular situation. The courts would likely give reasonable deference to such decisions, however, so long as such decisions were based on appropriate criteria such as those identified in this discussion. More generally, the exigencies of law enforcement and crime prevention, and the circumstances of a particular demonstration, would have to be taken into account before any videotaping of a demonstration could be characterized as constituting "threats, intimidation, or coercion."

In addition, various immunities protect law enforcement agencies and officials from official and personal liability under the MCRA. First, state agencies, and state officials

sued in their official capacities, are not "persons" subject to liability under the MCRA. See Commonwealth v. Elm Medical Laboratories, 33 Mass. App. Ct. 71 (1992). Second, law enforcement personnel at the state and local levels would enjoy a qualified immunity from personal liability under the MCRA for discretionary acts that did not violate the "clearly established" rights of participants in the demonstration being videotaped. See Duarte v. Healy, 405 Mass. 43 (1989); Elm Medical Laboratories, 33 Mass. App. Ct. at 81-82 n.15. Third, district attorneys enjoy absolute immunity from suit under the MCRA for acts that are "sufficiently related to the prosecutorial function . . . ." Chicopee Lions Club v. District Attorney for the Hampden District, 396 Mass. 244, 252 (1985). There is, however, some question as to whether a prosecutor's videotaping of potential illegal activity would be sufficiently closely associated with the judicial process as to warrant absolute immunity. Cf. Burns v. Reed, 111 S. Ct. 1934, 1943 (1991) ("We do not believe . . . that [an assistant district attorney's] advising the police in the investigative phase of a criminal case is so 'intimately associated with the judicial phase of the criminal process' . . . that it qualifies for absolute immunity.").

In sum, videotaping would not violate the MCRA, and should present no appreciable risk of personal liability for law enforcement personnel, so long as it were (1) undertaken for a legitimate purpose related to the duties of the law enforcement agency; (2) conducted on a content-neutral basis, i.e., without discrimination based solely on the subject matter of the demonstration (as opposed to the activities expected to occur at the demonstration); and (3) conducted in a manner that did not unnecessarily interfere with the demonstration being videotaped.

CONCLUSION

There are, of course, situations where videotaping is clearly warranted. Where illegal activity is actually occurring or is reasonably likely to occur, and particularly where persons involved in such activity may be attempting to conceal their identities, videotaping can serve as a valuable and even essential law enforcement tool for gathering evidence for a potential prosecution. The foregoing discussion of FIPA and the MCRA should illustrate that a careful evaluation of these circumstances, including consideration of the necessity of videotaping and its potential effect on the exercise of protected rights, ought to be sufficient to ensure that the videotaping complies with applicable law.

ASSISTANCE TO POLICE DEPARTMENTS OF OTHER MUNICIPALITIES IN THE ABSENCE OF FORMAL MUTUAL AID AGREEMENTS

by: Peter Sacks, Assistant Attorney General

Two questions have recently arisen regarding the provision of assistance between municipal police departments pursuant to G.L. c. 41, § 99 in the absence of a formal mutual aid agreement pursuant to G.L c. 40, § 8G.

Under G.L. c. 41, § 99, the mayor, selectmen, chief of police or equivalent, or in the absence of the chief the commanding officer, may, upon the request of any of these officials from any other city or town, provide police officers to that other city or town. Police officers so provided possess the same authority as constables and police officers within the requesting city or town, except as to service of civil process, and when exercising authority within such limits enjoy the same immunities and privileges as in the providing city or town. The providing city or town is entitled to receive from the requesting city or town the amounts paid to the officers for their service, including necessary traveling expenses. The provision of assistance under G.L. c. 41, § 99 is not mandatory; the decision whether to honor a request is a discretionary matter that rests with the responsible official(s) in the municipality receiving the request.

Under G.L. c. 40, § 8G, a city or town which accepts the section may enter into agreements with another municipality or municipalities "to provide mutual aid programs for police departments to increase the capability of such departments to protect the lives, safety, and property of the people in the area designated in the agreement." The agreement "may include the furnishing of personal services, supplies, materials, contractual services, and equipment when the resources normally available to any municipality in the agreement are not sufficient to cope with a situation which requires police action."

ASSISTANCE IN THE ABSENCE OF A FORMAL MUTUAL AID AGREEMENT

The first question is whether officers may be provided pursuant to the assistance-by-request statute, G.L. c. 41, § 99, even where there is no formal agreement in effect pursuant

to G.L. c. 40, § 8G. It does not appear that any such formal agreement is necessary. Nothing in the language of either statute suggests that a formal agreement is required. Moreover, the assistance-by-request statute dates back at least to 1880, see St. 1880, c. 82, which was long before the enactment of the assistance-by-formal-agreement statute, G.L. c. 40, § 8G, by St. 1972, c. 200, § 1. If a formal agreement were a precondition to the furnishing of assistance, then the Legislature would not have enacted the aid-by-request statute without having previously or simultaneously enacted an aid-by-formal-agreement statute.

This does not mean that the aid-by-request statute is a complete substitute for a formal mutual aid agreement. The assistance-by-formal-agreement statute, in providing for agreements covering "personal services, supplies, materials, contractual services, and equipment," is substantially broader than the assistance-by-request statute, which by its express terms provides only for temporary service by "police officers" in other municipalities. Particularly in this period of fiscal restraint and greater need to share scarce municipal resources, police departments, in consultation with other local government officials, may want to give renewed consideration to entering or expanding the scope of formal mutual aid agreements with departments in other municipalities.

THE NEED TO SWEAR-IN OFFICERS PROVIDING ASSISTANCE

The second question concerns whether officers furnished pursuant to the assistance-by-request statute must be specially sworn in the municipality making the request. Nothing in the statute so provides. Moreover, to take time out for such a special swearing-in might hinder the requesting police department's ability to respond to the very emergency situations at which the statute is directed. Nevertheless, the Supreme Judicial Court has repeatedly suggested that an officer furnishing aid pursuant to G.L. c. 41, § 99 must actually be "specially sworn in as a police officer in th[e] neighboring territory." Commonwealth v. Kerr, 409 Mass. 284, 287 (1991).

This issue was not directly presented in Kerr, and the other SJC cases reaching this conclusion, including Commonwealth v. LeBlanc, 407 Mass. 70, 73 (1990), and Commonwealth v. Grise, 398 Mass. 247, 249 (1986), ultimately rely on an Appeals Court decision, Commonwealth v. Harris, 11 Mass. App. Ct. 165, 171-72 n.6 (1981), that did not even cite G.L. c. 41, § 99. Nevertheless, until the issue is litigated and resolved, it makes sense to take the precaution, wherever

possible, of swearing in officers providing aid pursuant to the statute, in order to avoid any later question as to their authority. For further advice on this issue, police departments should consult with the office of the appropriate District Attorney.

LIMITS ON SOLICITATIONS BY POLICE ASSOCIATIONS

by: David E. Sullivan, Chief, Legal Division,
State Ethics Commission

The Massachusetts State Ethics Commission issued a February 11, 1993, advisory opinion that outlines the permissible limits under the state conflict of interest law for solicitation of donations by private police associations. The opinion specifically rules that police officers and/or their agents may not use any official title or resources -- including badges, uniforms, rank, official stationery or any municipal seal -- in connection with their fundraising efforts.

Issued in response to a request by a local police association, the opinion also prohibits statements or conduct that would give the impression that good or bad consequences in an individual's official dealings with the police might flow from a decision whether or not to donate.

Examples of prohibited solicitation activities would include: representing that a donation (including purchasing tickets to a fundraising event or purchasing an advertisement in a publication) could result in preferential police treatment, or that failure to donate could result in police reprisals; implying that a decision whether or not to donate could affect the timing or quality of police services; and the practice of sending stickers or decals intended for display on donors' private automobiles, the opinion said.

"[I]n our judgment reasonable persons would infer (from being sent a police association decal) the hope of favorable treatment -- or of avoiding adverse treatment -- by the police," the opinion said.

The Ethics Commission opinion also spelled out the need to clearly separate police officers' private solicitations from their public duties. In order to avoid violating the section of the conflict law (Section 23 [b][2] of G.L. c. 268A) that prohibits public employees from using official resources for private purposes, the legal opinion said, police officers may not solicit for their private associations while on duty, and even when they are off-duty, may not use official resources to benefit the association's fundraising efforts. Official resources include police department telephones, copying or fax

machines, other public supplies or facilities, official stationery or letterhead, badges, uniforms, or police rank.

"[T]hese public insignia could reasonably be perceived as an endorsement by a public agency of the solicitation, give the appearance that the solicitation is officially sponsored or foster a sense of credibility that the solicitation might not otherwise have had," the opinion said. "While we recognize and commend the many beneficial purposes for which police associations raise funds, § 23(b)(2) [of the conflict law] -- and the principle it embodies, of public employees' accountability for their use of public resources -- applies even if these purposes are public-spirited in nature."

These limitations on solicitation by police associations also extend to any agent of such an association, including any "professional solicitor," according to the opinion.

The opinion also noted that the conflict law's limitations on solicitations by police associations, as interpreted in the Ethics Commission opinion, supplement other laws that regulate charitable solicitations. In particular, the Ethics Commission opinion said that police association solicitations continue to be regulated by the statutes concerning false or deceptive solicitations, which are enforced by the Attorney General's Division of Public Charities, in addition to the limitations placed on solicitations under the conflict law.

"We acknowledge the constitutional rights to associate and to solicit funds for charitable purposes," the opinion said. "We are satisfied that our narrow application of § 23(b)(2) [of the conflict law] here, to prohibit both specific exploitation of official police powers and the use of official resources for the purpose of private solicitations, easily meets the constitutional standard."

For a copy of the Ethics Commission's opinion, or for other advice about the state conflict of interest law, contact the state Ethics Commission, One Ashburton Place - Room 619, Boston, Massachusetts 02108, or telephone (617) 727-0060 and ask for the Legal Division.

RECENT CASES

I. SEARCH AND SEIZURE

A. Searches Pursuant To Warrant.

Probable cause existed for issuance of warrant for house following controlled buy nearby, and police properly entered and secured house while warrant was being obtained. Commonwealth v. Blake, 413 Mass. 823 (1992). Police searched the defendant's home pursuant to a search warrant and seized cocaine, marijuana, a scale, a handgun, ammunition, and $2,915. The Supreme Judicial Court held that there was probable cause for the issuance of a search warrant for the defendant's home based on the following: two confidential informants told police that the defendant was engaged in drug dealing and owned several motor vehicles; a third informant (Mendoza), who had worked for law enforcement authorities for fourteen years, while at the defendant's home, arranged to buy drugs from the defendant; the defendant gave Mendoza a telephone and beeper number upon which to confirm the drug deal; the police verified the telephone number was listed to the defendant at his home; the defendant told Mendoza that he had 25 ounces of cocaine on hand and could deliver 9 ounces the next day; the next day, Mendoza called the defendant, who said he would deliver the drugs at a nearby gas station; the police saw the defendant leave his house and go to a gas station; per their arrangement, the defendant met Mendoza at the gas station and left a paper bag containing cocaine on the front seat of his car; Mendoza signaled into a hidden microphone and the agents arrested the defendant.

The court ruled that there was a sufficient nexus between the controlled buy and the defendant's house to establish probable cause to believe there would be drugs in the house based on the following: the defendant told Mendoza that he had twenty-five ounces of cocaine "on hand" and could deliver nine ounces the next day; he gave Mendoza a beeper number and telephone number listed to the defendant at his apartment, and Mendoza telephoned him there before the controlled buy; and the agents watched the defendant leave the house shortly after the telephone call and drive to the gas station.

Following the defendant's arrest, police went to the defendant's house and secured the premises while an officer applied for a search warrant. When the police heard that the search warrant had been issued, they began their search. The Court ruled that the police officers' securing the defendant's house to prevent the destruction of evidence before the warrant

was issued was not an illegal search and seizure since the search did not begin before the warrant was issued. The court noted that even if the securing or entry of the house were illegal, the subsequent seizure of evidence was legal because there was an independent source -- here, the warrant based on information independent of the entry of the house -- for the seizure.

Affidavit in support of search warrant, viewed as a whole, provided probable cause to search. Commonwealth v. Monterosso, 33 Mass. App. Ct. 765 (1992). Police searched the defendant's apartment pursuant to a search warrant. The affidavit in support of the search warrant stated that two days before the date of the search warrant, the defendant's landlords told the police that they believed the defendant was dealing drugs from his apartment. The landlords based this belief on their observations of many people entering and exiting the defendant's apartment within a short period of time. An informant, who had in the past made controlled buys for the affiant resulting in seizures of controlled substances and arrests, attempted a controlled buy from the apartment, but failed. The informant reported that he saw a trail of marijuana smoke coming from the defendant's apartment. The affiant and another officer went to the building, and smelled marijuana at the door of the defendant's apartment. The affidavit also included reference to the defendant's three prior convictions for narcotics offenses, including distribution of cocaine, all of which occurred less than nineteen months before the date of the affidavit. The affiant, an experienced narcotics investigator, also concluded that the information from the landlords and the recent convictions showed that the defendant "has a history and an up-to-date continuous record of selling controlled substances."

The Appeals Court upheld the issuance of the search warrant, concluding that a logical, commonsense reading of the affidavit leads to the conclusion that marijuana was present in the defendant's apartment within two days of the date of the affidavit. Noting that it was debatable whether the informant's past participation in controlled buys established his credibility, the circumstances of his report of marijuana smoke reasonably supported the conclusion that he was reliable, since the officer's were closely supervising his entry into the building, and their detection of marijuana smoke corroborated the informant's information. The Court noted that the landlords' information, combined with the information concerning the defendant's three prior convictions for selling marijuana and cocaine, and the weight given to the "special insight of an experienced police officer" all established the

probability that marijuana would be found inside the defendant's apartment.

Defendant's recent drug arrests and informant's observation of drugs and cash in defendant's apartment supported no knock warrant. Commonwealth v. Prunier, 33 Mass. App. Ct. 944 (1992). Although the fact that drugs are the object of a search is not alone sufficient to support the issuance of a no-knock warrant, the issuance of a no-knock warrant was proper in this case, where facts were presented to the magistrate who issued the warrant showing disposal of the evidence was particularly likely if the police were to knock and announce the search. The affidavit in support of the application for the warrant stated that: (1) the defendant had been arrested on cocaine and marijuana charges nine weeks earlier; (2) the same informant who had provided information leading to the earlier arrest told police that he had just purchased an "eight ball" of cocaine at the defendant's apartment, that there were several eight balls and a large amount of cash on a table there, and that defendant was doing a good business; and (3) based on the officer's experience, these drugs were easily destroyed by flushing them down the toilet. In light of the recent bust and easily disposable drugs, the no-knock warrant was justified, since the magistrate could reasonably conclude that the defendant was prepared for quick disposal of the drugs.

B. Warrantless Searches.

Police justified in entering apartment into which shooting suspect had possibly fled based on exigent circumstances. Commonwealth v. Paniagua, 413 Mass. 796 (1992). A police officer on patrol heard a radio report of gunshots having been fired in a hallway at 166 Seaver Street, Roxbury. Within one minute, he arrived at the building. A minute or two later, other police officers appeared at the scene. As the officers entered the building, a woman standing in the second-floor hallway said "They ran in there," and pointed to the rear door of a third-floor apartment. As some police officers drew their guns, three officers went up the front stairs and two went up the rear stairway.

A man, not the defendant, opened the rear door to the third-floor apartment, looked out, and closed the door. He then opened the front door and asked the officers there what they wanted. He said he knew nothing about a shooting. The police officers entered the apartment, and saw the defendant, carrying a gun, running toward the kitchen. Two officers chased the defendant, and saw him throw the gun and a tinfoil

ball into a trash can. A police officer retrieved the weapon and the aluminum foil ball.

The Supreme Judicial Court affirmed the arrest of the defendant and the seizure of the gun and foil ball. The Court concluded that, because of the report of the discharge of a firearm, the officers reasonably believed that the situation in the building was life-threatening. A woman targeted the apartment into which the shooter apparently fled. The opening and the closing of the apartment's rear door further identified the apartment as a possible location of the shooting suspect. The Court concluded that the police officers were clearly warranted in concluding that there was a danger to the public, and that speed was essential in order to apprehend the person who fired the shots. The Court therefore ruled that the police officers had probable cause and exigent circumstances justifying the warrantless entry into the apartment, and that the discovery of the defendant, the gun, and the foil ball in plain view was lawful.

Where police saw defendant place something in waistband of his pants, they were justified in seizing plastic bag containing white powder during search for weapons. Commonwealth v. Johnson, 413 Mass. 598 (1992). The defendant was convicted of trafficking in cocaine, possession of marijuana, and unlawful carrying of a firearm. Officers travelling in an unmarked cruiser were nearly hit by the defendant's car as it travelled at a high rate of speed through an intersection. The officers activated the cruiser's siren and flashing lights and chased the defendant for three to five minutes, at speeds of up to 50 miles per hour. An officer in a second cruiser responded to the other officers' call for assistance, and forced the defendant's car to stop. As the officers ran to the defendant's car, one of the officers saw the defendant put something in the waistband of his pants. He yelled a warning to the other officers and told the defendant to "freeze." Two of the officers pulled the defendant from his car, and, while pat-frisking him, withdrew from his waistband a plastic bag containing a lump of white powder, and three bullets in a pouch strapped around his waist. The police found a gun beneath the driver's seat of the car.

The defendant acknowledged that the officers were justified in removing him from his car and conducting a pat-frisk, but argued that the frisk went beyond the permissible scope, because the officers could not reasonably believe that the plastic bag contained a weapon. Noting that the issue was whether the circumstances facing the officers would warrant a reasonably prudent person to believe that his or her safety, or the safety of others, was in danger, the court concluded that

it was proper for the officers to find out what the defendant had concealed in his pants. In reaching this conclusion, the Court relied upon the facts that the defendant drove his car at a high rate of speed, nearly crashed into the cruiser, stopped only when forced to do so by another cruiser, and reached into his waistband as the officers approached his car. The court recognized that the officers had only a few seconds to assess the situation, and had to act quickly to neutralize any danger the defendant posed to them. The court further noted that the scope of the search was limited to the perceived threat, finding out what the defendant hid in his waistband, and was not a general exploratory search for evidence.

The Court also held that the search was justified as a search incident to a lawful arrest. The officers had probable cause to arrest the defendant for the offense of operating to endanger as soon as they stopped him. Once he was pulled from the car, the defendant was effectively under arrest. The police officers, incident to the arrest, could search him for weapons that might be used to resist arrest. Once the officers discovered the cocaine, they were justified in searching further for evidence of the drug offense.

Warrantless search and seizure justified by police corroboration of informant's detailed tip. Commonwealth v. Triantafillakos, 33 Mass. App. Ct. 949 (1992). The Court found probable cause to arrest and search the defendant based on information provided by an informant who had previously provided information leading to convictions for drug offenses, corroborated by police surveillance. Specifically, the informant told police: (1) the date and approximate time at which the defendant would be carrying a large quantity of cocaine; (2) the weight, height, and hair color of the defendant; (3) the "tag number" of the taxi he would be driving; and (4) the two possible locations where he would be, and the fact that he would be going from one of those locations to the other. This information was corroborated by police surveillance, during which they saw the defendant at the indicated time at one of the two locations. The defendant was carrying a small bag, and got into a taxi with the tag number indicated by the informant. The defendant then headed toward the second location, and was arrested when he stopped for a passenger.

C. Terry Stops.

Officer justified in stopping defendant when he acted suspiciously in area of recent break in, and fled when asked questions by police. Commonwealth v. Marrero, 33 Mass. App. Ct. 440 (1992). Two uniformed police officers were patrolling in an area where a previous break-in had occurred. The officers approached a group of young men who were standing near the site of the earlier break-in, an abandoned building. The defendant appeared from around the corner of the building and approached one of the officers. The officer attempted to ask the defendant a few questions, but the defendant shouted, "Fuck you," and fled. The officer pursued the defendant, who threw a loaded firearm aside during the chase. He was caught and arrested. The defendant claimed that the abandoned gun was obtained as the result of an illegal stop of the defendant because the officer did not have reasonable suspicion justifying a stop at the time the defendant fled, relying on Massachusetts law indicating that a stop starts when pursuit begins.

Although noting that this was a "close case," the Appeals Court held that the following facts and circumstances permitted the pursuit of the defendant: 1) there had been a recent breaking and entering in the area; 2) the officer thought the group of men may have been serving as lookouts for accomplices involved in further criminal activity; 2) the officer saw the defendant quickly emerge from a doorway that the officer was unable to see; and 3) the defendant abruptly fled when the officer attempted to question him. This latter factor transformed the officer's suspicion into a "reasonable suspicion" justifying the pursuit and stop while the building was investigated.

Informant's tip, corroborated by officer's observations, justified investigative stop of drug courier. Commonwealth v. Mebane, 33 Mass. App. Ct. 941 (1992). The police received a tip from a confidential informant, who had previously given information which led to an arrest for cocaine trafficking, concerning the arrival by train of a man carrying drugs and illegal weapons. The informant told police the individual's name; physical description including height, facial hair, and a pronounced limp; and indicated that the train would be coming from New Haven, Connecticut and arriving at 9:30 p.m. This information was corroborated by the officer's independent observations at the train station of a man getting off a train from New Haven at 9:30 p.m., fitting the description given by the informant, and carrying a large, gift-wrapped box. The Court concluded that the informant's detailed tip, plus the

independent police corroboration of the details, was sufficient to establish probable cause. Moreover, the information obtained by the police during the investigative stop, including the fact that the defendant told them that he was going to a specific address in Dorchester, where the officers knew the department's drug unit had recently conducted a raid and found weapons and drugs, provided additional corroboration to provide probable cause for the arrest and search.

II. NARCOTICS OFFENSES

A. Expert Testimony.

Officer properly gave expert testimony concerning operations of street level dealers. Commonwealth v. Dennis, 33 Mass. App. Ct. 666 (1992). At trial an experienced narcotics investigator was allowed to describe the operations of street-level dealers in the defendant's trial for trafficking in cocaine. Specifically, the officer testified that the distribution system used in the area is a "runner" or "buffer" system, in which the principal dealer, in order to reduce risk, uses a runner to complete sales. The runner holds a small amount of drugs, and holds the currency until he or she has acquired a large sum. The dealer often hides the stash in one of several places. The Court found that this type of information was beyond the knowledge of the average juror, and therefore was proper expert testimony. The Court noted that the officer only testified to the general characteristics and operations of a street dealer, and did not attempt to make any kind of comparison or comment on the specific facts of the defendant's case.

Officer's opinion about white powder contributed to proof that substance was cocaine. Commonwealth v. Paniagua, 413 Mass. 796 (1992). The defendant was convicted of possession of cocaine, based on the contents of a tinfoil ball police saw the defendant throw into a trash can. A police officer testified that the tinfoil ball that the defendant threw into the trash contained a white, rock-like, powdery substance which he believed to be cocaine. A chemist analyzed the contents of three aluminum foil packets and determined the powder contained 10.43 grams of cocaine. The Court held that the jury could determine that at least one, if not all three, of the balls contained cocaine, and could credit the testimony of the police officer who removed the foil ball from the trash as to his belief that it contained cocaine. The Court noted that it would have been better for the Commonwealth to make explicit the drug training and experience of the officers.

B. Evidence of Possession.

Evidence of defendant's constructive possession of drugs in ceiling outside apartment not sufficient. Commonwealth v. Caraballo, 33 Mass. App. Ct. 616 (1992). A detective received an anonymous telephone call from someone stating that an Hispanic male was selling cocaine from apartment 610 at 270 Huntington Avenue. The caller stated that the cocaine might be hidden in either an electrical box or the ceiling. Upon arriving at that location, the police saw the defendant standing by a chair in the hallway outside apartment 610. No one else was in the corridor. The defendant gave no reply when asked what he was doing. When asked where he lived, he pointed to apartment 610. The door to that apartment was partially open, and two people were inside looking out. One of the officers then got up on the chair, slid back the ceiling panel, and searched around with his hand. He retrieved a large bag of cocaine. After arresting the defendant his apartment was searched, but no drugs, money, or drug paraphernalia were found.

While there was no claim that the officer's search of the ceiling was improper, the Court held that the evidence at trial was insufficient to warrant a conviction because the defendant constructively possessed the cocaine, because there was no incriminating evidence other than the defendant's presence in the hallway near the drugs. The Court noted that, although the Commonwealth's inferences - that the defendant left his apartment to get drugs for the two people inside, and either was about to climb on the chair or had just come down - may be reasonable, there were equally reasonable, inconsistent inferences which could be drawn, so there was insufficient evidence of the defendant's constructive possession of the drugs.

Evidence insufficient to establish defendant's constructive possession of stash of cocaine. Commonwealth v. Dennis, 33 Mass. App. Ct. 666 (1992). The Court concluded that the evidence was insufficient to sustain the defendant's conviction of trafficking in cocaine, which was based on the theory that the defendant was in constructive possession of 21.3 grams of cocaine found in an abandoned automobile, because it did not establish that the defendant had knowledge of the cocaine and the ability and intent to exercise dominion over it. During an hour-long surveillance, the police saw three to five cars stop in front of a house, and the driver would either approach or be approached by one of three youths who were standing in front of the house while the defendant stood nearby. One officer approached two of the youths, and asked to buy a bag of pot. One of the youths looked toward the defendant, who shook his

head from left to right. The youth said, "Can't do it, man." The officer drove around the block and pulled up again, again asked for a bag of dope, and was sold a bag of heroin by one of the youths. During this time, the defendant and another youth stood near the corner of the house in front of the driveway, in which was parked an abandoned car. While the police were arresting the youths, the defendant started to walk away, then stopped near a trash can and threw packets of cocaine inside. When arrested, the defendant was carrying $192. The police found in the abandoned car seventy-seven bags of cocaine, packaged identically to the cocaine found in the trash can.

In concluding that this evidence was insufficient to establish that the defendant had constructive possession of the drugs in the car, the Court noted that the defendant's presence near the car, standing alone, does not establish a nexus between the drugs in the car and the defendant. From the evidence that he possessed packets which matched the stash in the car, the Court noted that one could only infer that he was either a buyer or seller. The Court further concluded that the amount of cash on the defendant's person was not significant. The headshake to the youth who sold the heroin to the officer did not establish a nexus between the defendant and the cocaine in the car, the Court ruled, since the youth was not found in possession of cocaine, but of heroin. Finally, the Court found that the fact that the defendant did not stop when ordered to is as suggestive of his awareness that he possessed cocaine as it was of a claim that he was trafficking.

C. Evidence of intent.

Conviction of possession with intent to distribute reversed where only evidence of intent was fact that defendant possessed seven half-grams of cocaine instead of an eight-ball. Commonwealth v. Murphy, 34 Mass. App. Ct. 16 (1993). During a search of the defendant, police found in his pocket seven paper packets containing 2.8 grams of white powder consisting of 17 percent cocaine. Analysis indicated that the cocaine had been cut twice, once with lidocaine and once with inositol. A State Trooper testified that these packets were "half grams," with a street value of $50. He also testified that it is cheaper to purchase an "eight ball," or 3.5 grams of cocaine, than to purchase individual packets. The defendant was convicted of possession of cocaine with intent to distribute, and with possession of cocaine.

The Appeals Court reversed the defendant's conviction for possession with intent to distribute, and affirmed the conviction for possession. The Court noted that there was no evidence to show whether the packaging and amount of cocaine in

issue was more consistent with personal use than with an intent to distribute, and that the only evidence relating to the defendant's intent was the Trooper's statement that it would be cheaper to buy the same amount of cocaine as an eight-ball. The Court held that the inference the Commonwealth sought to draw, that no one would possess seven half-gram packets for personal use because, if consumption wee intended, one would possess a single packet of the less expensive eight-ball, was not reasonable.

Purchasing drugs, with intent to transfer, constitutes distribution, even if purchase with group of friends intending to share. Commonwealth v. Johnson, 413 Mass. 598 (1992). The defendant, who was convicted of trafficking in cocaine, argued that where two or more persons contribute money to buy drugs but only one person carries out the purchase, they are all guilty of mere possession since they are co-owners of the drugs and intend only to share them and not to distribute them. The Court held, however, that to purchase a controlled substance, even with friends' money, intending to transfer it to them, constitutes distribution within the meaning of the trafficking statute.

Despite small amount of drugs seized, facts supported conviction for possession with intent to distribute. Commonwealth v. Gonzalez, 33 Mass. App. Ct. 728 (1992). Although the amount of heroin seized from the defendant was small (.32 grams), the Appeals Court found sufficient evidence to uphold the defendant's conviction for possession with intent to distribute. The combinations of factors that led the Court to this conclusion included evidence that: (1) the "bundle" packaging of the heroin was consistent with distribution rather than personal use; (2) the bundle was worth between $180 and $200; (3) each glassine bag was embossed with a "scorpion," a mark indicative of an individual dealer's brand; (4) the defendant was arrested in a "high drug activity" area; and, (5) although unemployed, the defendant had $167 in "loose currency" in his pocket.

D. "School zone" statute.

Commonwealth must prove type of school fits within "school zone" statute. Commonwealth v. Gonzalez, 33 Mass. App. Ct. 728 (1992). Police searched the defendant and found 10 glassine packets of heroin. His arrest took place 606 feet from the "Worcester Academy." The Commonwealth offered no evidence that identified the "Worcester Academy" as an "elementary, vocational, or secondary school," as required by G.L. c. 94C,

§32J, the "school zone" statute. The Appeals Court stated that the statute does not apply to all schools, but only to elementary, vocational, and secondary schools, and that without any evidence as to whether this school fell within one of those categories, the Commonwealth did not sustain its burden of proof. The Appeals Court suggested that, in the future, the arresting officer, or any other witness with personal knowledge, such as the school principal, could testify that the school is an "elementary, vocational, or secondary school." The Court also noted that the parties may stipulate to that fact, but that it probably would not be a proper subject of "judicial notice."

Defendant properly convicted under "school zone" statute where he possessed drugs within school zone with intent to distribute elsewhere. Commonwealth v. Roucoulet, 413 Mass. 647 (1992). The defendant plead guilty to an indictment charging him with trafficking in cocaine, and was found guilty following a jury-waived trial of a violation of G.L. c. 94C, §32J, the "school zone" statute. The issue on appeal was whether the Commonwealth had to prove that the defendant intended to distribute drugs within the school zone.

An undercover officer arranged with Joseph DiFilippo to purchase cocaine from him. While DiFilippo was kept under surveillance, the police saw him meet with the defendant, who was in a Dodge Caravan. After the meeting, DiFilippo sold cocaine to the officer. The officer arranged a second drug purchase from DiFilippo. The officer met with DiFilippo at DiFilippo's home, and gave him marked money. DiFilippo told the officer he was waiting for a telephone call from his supplier, "Art" (the defendant's first name). After receiving a telephone call, DiFilippo left. While the undercover officer waited at the home, other officers saw DiFilippo go to a convenience store parking lot and meet the defendant, who was in a Dodge Caravan. DiFilippo and the defendant drove around several streets, then returned to the parking lot, which was located 325 feet from an elementary school. Upon recognizing police officers moving in to arrest him, the defendant drove away and hurled several items from the van during the chase, including cocaine packaged in baggies and an "OZ" sheet, a drug dealer's record of transactions. Police stopped the van and seized a large quantity of cocaine, cutting agents, and some of the marked money that the undercover officer gave to DiFilippo.

The Court rejected the defendant's claim that he was not guilty of violating the school-zone statute because he intended to distribute the cocaine at DiFilippo's home, which was outside the school zone, and merely possessed it within the school zone. Noting that the clear purpose of the statute is

to create a drug-free school zone, the Court held that, since the defendant was within 1000 feet of a school when he possessed the cocaine with intent to distribute, he was properly convicted under the "school zone" statute, and there is no requirement that he specifically intend to distribute the cocaine within the school zone.

Distance from school to site of offense for purposes of "school zone" statute may be measured in straight line. Commonwealth v. Spano, 413 Mass. 178 (1993). Police executed a search warrant at the defendant's home and found cocaine, drug paraphernalia, $960 in cash, and Inositol. At trial, the prosecution introduced evidence that an officer, using a roller tape measurement, measured from the school straight to a point on the defendant's property line, a distance of 470 feet, with an additional thirty to forty feet to his residence. An investigator for the Committee for Public Counsel Services testified that the most direct automobile route was 4,224 feet, but a straight line measurement was 512 feet. The defendant was convicted under the school zone statute. On appeal, he argued that, since the statute provides no standard for measuring the distance, it is unconstitutionally vague.

The Supreme Judicial Court held that, absent express provisions in the statute specifying the method of measurement, there is no reason why the measurement should not be a straight line from the school's boundary line to the site of the illegal drug activity.

E. Forfeiture.

"Middleman" in drug transaction, who knowingly drives supplier to meet buyer, is subject to have car forfeited. Commonwealth v. One 1987 Mercury Cougar Automobile, 413 Mass. 534 (1992). The Supreme Judicial Court affirmed the forfeiture of a car used to drive a participant in a drug transaction. The automobile's owner, Penta, agreed to set up a sale of cocaine to an undercover police agent. Penta drove his supplier in the Cougar to the agent's house. The supplier then waited in a restaurant, while Penta entered the agent's house to collect the money. Police arrested Penta while he was inside counting the money, and the supplier was arrested outside the car with the cocaine on him. Penta tried to avoid forfeiture by arguing that he did not know that the supplier actually had cocaine on him while he was in the Cougar. The Court held that the Commonwealth did not have to prove that the drugs were actually in the Cougar, as long as it could show that the car was used to "facilitate" a drug deal. It held that knowingly conveying a person who plans to participate in a prearranged drug

transaction to the location of that transaction facilitates the distribution of drugs, and therefore subjects the car to forfeiture under the statute.

F. Entrapment.

Where undercover police make themselves available to sell drugs if asked, subsequent conviction of defendant who purchased from officer is legal. Commonwealth v. Lacend, 33 Mass. App. Ct. 495 (1992). The defendant was arrested for unlawful possession of cocaine after he approached an undercover police officer who was standing at a location known for drug dealing, asked the officer whether he had any drugs to sell, gave the officer money, and took a small amount of cocaine. The defendant argued that the police had entrapped him into buying the drugs and had violated the law themselves by selling illegal drugs.

The Appeals Court held that the facts did not establish a case of entrapment because the defendant initiated the request to purchase the drugs, and there was no evidence of suggestive or improper inducement by the officer, such as lengthy negotiations, aggressive persuasion, coercive encouragement, or repeated or persistent solicitations. The Court noted that even a passive request by the officer, which would be insufficient to constitute entrapment, was not present here.

The Court also held that police did not act illegally by purporting to sell drugs in this kind of "buy-bust" operation since under G.L. c. 94C, §7(d)(3), law enforcement officers acting in the regular performance of their official duties may possess and distribute controlled substances.

III. ADMISSIONS AND CONFESSIONS

Prosecutor properly commented on omissions in defendant's statements to police which were at odds with his trial testimony, where he did not invoke right to remain silent. Commonwealth v. McClary, 33 Mass. App. Ct. 678 (1992). Police searched the defendant's home pursuant to a search warrant, and found, in his bedroom and exercise room, the following: an envelope with ten bags of cocaine totalling over 279 grams, two scales, two bags of marijuana, a THC extractor and various drug paraphernalia, including three empty plastic bags with cocaine residue found in the bedroom closet. During the search, an officer called the defendant at work to inform him of the search. The defendant said, "you're wasting your time, you're not going to find anything." The officer responded that they had already found the cocaine and three pounds of marijuana, to which the defendant replied, "oh, shit." The defendant returned home, and was arrested and advised of his Miranda

rights. He told the police that they had found all the drugs that he had there and that further efforts would be wasted. He also stated that he had purchased the THC extractor from a magazine eight years earlier.

At trial, the defendant acknowledged ownership of the marijuana, and said it was for personal use and possible resale, but testified that the cocaine belonged to a friend, who left it at the defendant's home the day of the search. The prosecutor asked the defendant if, on the day of the search, he told the police who owned the cocaine, and he said "no." In his closing argument, the prosecutor challenged the defendant's story, questioning why he would hold such a large amount of cocaine for a third party and yet fail to mention that person to the police when the search was conducted. The defendant was convicted of trafficking in cocaine, and possession of marijuana with intent to distribute.

On appeal the defendant claimed that the prosecutor's questions at trial, and the comments in closing, concerning the defendant's failure to tell the police who owned the cocaine, were improper comments on his post-Miranda silence. The Appeals Court disagreed, concluding that the defendant did not invoke his right to remain silent during the police questioning since he answered the officer's questions concerning the crime. Once a defendant answers questions concerning the crime for which he is arrested, the prosecution not only may use those statements to impeach the defendant when they differ from his trial testimony, but may ask about any omission which is at odds with his trial testimony. The court noted, however, that under no circumstances could the prosecution comment on a defendant's failure to volunteer his innocence.

IV. IDENTIFICATION

A one-on-one identification made promptly after crime was not unnecessarily suggestive. Commonwealth v. Leonardi, 413 Mass. 757 (1992). While alone in a friend's home, the victim was awakened by the sound of someone walking through the house and saw the defendant standing in the bedroom door with a baseball bat. The defendant struck the victim several times, left the room, then came back and pulled the victim to the bathroom, where he forced the victim into a tub of hot water. The defendant forced the victim's face into the water, while hitting him with the baseball bat. At this time the defendant's face was two to three inches from the victim's face. The lights were on in both rooms during the assault, which lasted approximately 25 to 30 minutes. Further, the defendant identified himself by his first name.

Later the same evening, while being treated at the hospital, the victim gave a description of his assailant, which was consistent with the defendant. After being advised of his Miranda rights, the defendant voluntarily agreed to go to the hospital to see whether the victim could recognize him. The officer told the victim that he had a suspect who matched the description the victim had given, and then brought the defendant into a well-lit area within four feet of the victim. The victim identified the defendant as his assailant.

The Supreme Judicial Court held that, although it would have been better if the police officer had not told the victim he was bringing in someone who fit his description, the one-on-one confrontation was not unnecessarily suggestive, noting that the identification arose from a straightforward showing to the victim of a person that matched the description supplied by the victim. The Court noted that one-on-one confrontations conducted promptly after the commission of a crime are justified by the need for prompt criminal investigation while the victim's recollection of the offender is fresh.

V. MISCELLANEOUS

Death by drug overdose not shown to be caused by reckless conduct of person who sold drugs, so no recovery under Compensation for Victims of Violent Crimes Act. Marshall v. Commonwealth, 413 Mass. 593 (1992). A minor bought 30 Xanax tablets one day, and consumed 5 of the tablets with alcoholic beverages some time during the next day. That night, she had an argument with her boyfriend, and at 1:00 a.m. the following morning was seen at a hotel, crying and looking for drugs. Two hours later, after an interval in which her movements were unknown, she lost consciousness and later died. The Supreme Judicial Court concluded that there was no evidence to warrant a finding that the minor died from drugs (the 30 Xanax tablets) that had been sold or given to her in circumstances demonstrating wanton or reckless conduct, and therefore her family could not recover funeral expenses under the Compensation for Victims of Violent Crimes Act.

Agreeing on telephone to make a legal bet for another as a favor, without compensation, is not illegal. Commonwealth v. Sousa, 33 Mass. App. Ct. 433 (1992). The defendant was the general manager of Wonderland Greyhound Park in Revere. He was convicted of using a telephone for the purpose of accepting wagers or bets on dog races, a violation of G.L. c. 271, §17A. The charges arose out of a court-authorized wiretap of the telephone of Abraham Sarkis, father of the owner of

Wonderland. There was evidence that Sarkis was a regular visitor to Wonderland where he regularly placed lawful bets. Sarkis became sick and was unable to attend the track. He had a telephone conversation with the defendant in which the defendant asked him if he wanted something and Sarkis said, "one and one double . . . [for] [f]ifty, sixty . . ." The defendant testified that immediately after the conversation, as a favor to Sarkis, he went to Wonderland and paid for a ticket as requested on the telephone and gave it to Sarkis.

The Court reversed the defendant's gaming conviction. The court ruled that G.L. c. 271, §17A does not make it a criminal offense for an individual to agree on the telephone, without compensation or profit, to make a legal bet at a racetrack as an accommodation or favor to another. The Court indicated that it was not considering how it would rule if there had been compensation or profit to the defendant or if he had accommodated Sarkis in making an illegal bet.

"Egging" falls within statute prohibiting destroying, defacing, marring, or injurring religious building. Commonwealth v. DiPietro, 33 Mass. App. Ct. 776 (1992). The defendant was convicted of religious vandalism under G.L. c. 266, §127A for throwing eggs at ("egging") a Hindu Temple. The statute allows for a conviction when an individual "destroys, defaces, mars, or injures" religious and other specified buildings. The Appeals Court upheld the conviction, rejecting the defendant's argument that because eggs can be washed off, he did not cause substantial harm to the building which, he contends, is required by the statute. The Court held that the statute does not require substantial or permanent harm, and that the purpose of the statute is to deter any physical attack of vandalism against specified buildings.

Superior Court upheld revocation of alcohol beverage license of bar which was site of numerous arrests for drug related offenses. Billy Murphy's Inc. v. ABCC, Middlesex Superior Court. The Middlesex Superior Court upheld a decision of the ABCC and the Lowell Licensing Commission revoking the license of a bar which in one recent twelve month period had been the site of eleven sets of arrests for possession, possession with intent to distribute, or trafficking, of heroin or cocaine. The bar has been closed since the ABCC's decision in June.

Police chief convicted of felony, and on suspension from employment, not entitled to superannuation retirement pension. DeLeire v. Contributory Retirement Appeal Board, 34 Mass. App. Ct. 1 (1993). DeLeire was the Chief of Police in Revere who was convicted of obtaining an advance copy of the police chief

promotional examination. This case involved his application for a superannuation retirement pension. The Appeals Court ruled that he was not entitled to the pension.

Upon his indictment for conspiracy in violation of federal law, DeLeire was suspended in accordance with G.L. c. 268A, §25. After his conviction in the examscam case, DeLeire filed a retirement application. State law precludes payment of retirement benefits to an employee under suspension and also provides for forfeiture of a state pension when an employee is discharged for moral turpitude. DeLeire submitted a letter of resignation the day before the Revere Retirement Board denied his application. The Appeals Court held that the resignation was not effective because it was not accepted, and because the only purpose in tendering it was to circumvent c. 268A, §25, and he was therefore barred from receiving his pension while under suspension. The Court also held that he was automatically discharged under state law upon conviction of a federal felony and therefore forfeited his rights to a pension. The Court further held that DeLeire is entitled to the return of his accumulated deductions. However, such return is conditioned upon DeLeire's making full restitution of the funds he misappropriated, which would be the difference in salary paid as chief and what he would have received in his former position. The case was remanded to the Contributory Retirement Appeal Board for a determination of the accumulated deductions and amount misappropriated.

ASSISTANCE AND CONTACTS AT THE OFFICE OF THE ATTORNEY GENERAL

Below is a list of individuals at the Office of the Attorney General who you can call for assistance. The main office number for all extensions listed below is (617) 727-2200. The office address is: Office of the Attorney General, One Ashburton Place, Boston, MA 02108.

	Ext.
Scott Harshbarger, Attorney General	2042
Thomas Green, First Assistant	2057

CRIMINAL BUREAU

Edward Rapacki, Bureau Chief	2810
Susan Hicks Spurlock, Deputy Bureau Chief	2809
Michael Cassidy, Deputy Bureau Chief	2856
Pamela Hunt, Chief, Appellate Division	2826
Alexander Nappan, Chief, Narcotics Division	2517
Mark Smith, Chief, Public Integrity Division	2846
David Burns, Chief, Special Investigations Division	2589
Lt. Jack Kelly, Chief, Criminal Investigations Division	2838
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John Ciardi, Chief, Economic Crimes Division	2858
Walter Sullivan, Chief, Asset Forfeiture Unit	2508
Michael Kogut, Chief, Medicaid Fraud Control Unit	3814

Brian Burke, Chief,
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Law Enforcement Newsletter

FROM THE OFFICE OF THE
Attorney General
For The Commonwealth of Massachusetts

Scott Harshbarger
Attorney General

Contact:(617)727-2200

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Letter from the Attorney General

Report on Domestic Violence: A Commitment to Action

July, 1993

To Members of the Law Enforcement and Criminal Justice Community:

The impact of domestic violence is well-known to the law enforcement and criminal justice community:

* In Massachusetts, on average, someone was killed as a result of domestic violence every 22 days in 1990; every 16 days in 1991; every 13 days in 1992 and, as of May 21, 1993, every 9 days.

* Nationally, an estimated two million women are severely assaulted by their male partners every year.

* Furthermore, it is estimated that 40 to 60 percent of the calls police in Massachusetts respond to involve domestic violence.

The tragic reality is that for women and children domestic violence is the face of crime in the 1990's. They are far more likely to be the victims of violence in their own homes, at the hands of someone they know than by a stranger on the street.

In an effort to create a "blueprint" for the future and to recognize all of the programs and initiatives that we already know work, my office and the Center for Health Communications at the Harvard School of Public Health, directed by Associate Dean Jay A. Winsten, recently released a comprehensive 73-page report on domestic violence entitled, "Report on Domestic Violence: A Commitment to Action".

The report, which was generated from a series of working luncheons held over the past two years, co-sponsored by my office and the Center for Health Communications, outlines major recommendations for a statewide domestic violence policy in

Massachusetts, and recognizes that the best form of public protection is prevention.

The series, conducted in cooperation with the Massachusetts Coalition of Battered Women Service Groups, was designed to deepen understanding of ways to reduce the incidence of domestic violence. Participants in the luncheon series included members of the criminal justice system and law enforcement, academicians, key policy makers, legislators, advocates and members of the media.

The luncheon series was modeled after the drunk driving luncheon series of several years ago, also co-sponsored by my office and the Center, and resulted in the "designated driver concept" -- a highly effective and nationally-recognized component of many anti-drunk driving campaigns.

The key recommendations contained in this report fall into three major areas:

(1) Early intervention and prevention;

(2) The need for an integrated, multidisciplinary approach to the problem of domestic violence; and

(3) Long-term strategies to protect victims and prevent further domestic violence in Massachusetts.

The report contains 32 recommendations for future action; many of these recommendations are based on actions and initiatives already undertaken in Massachusetts by prosecutors, police departments and the courts. They are the result of a virtually unprecedented opportunity, over the course of two years, to have a regular dialogue among the various professions and disciplines which represent the real "players" in the effort to effectively address the problem of domestic violence.

Included in the report are key recommendations for:

* The formation of special domestic violence units in every police department;

* Statewide replication of the "Quincy Model," a successful, integrated, multidisciplinary program;

* The creation of specialized treatment programs for batterers with alcohol and other substance abuse problems;

* Domestic violence training for health care workers and key players in the law enforcement and criminal justice communities;

* Employer protocols for dealing with employees who are victims or perpetrators of violence, and employee assistance programs which include the provision of appropriate services and referrals for domestic violence; and
* Legislation to amend Massachusetts law to allow minors to seek medical treatment for injuries related to domestic violence, without having to obtain parental permission.

I do not believe that there are any magic panaceas or simple solutions to the problem of domestic violence, and these recommendations reflect that fact. Nor do I believe that law enforcement alone or any one piece of legislation will solve the problem of domestic violence. However, I do believe that these recommendations are an important first step towards the prevention of domestic violence, and it is my intention to work to implement these recommendations as part of my continuing commitment to address this epidemic of violence.

The recommendations listed above merely highlight some of the intervention efforts that need to be implemented, if we are seriously committed to breaking the cycle of family violence. I urge you to contact us to obtain a copy of the complete report for a more in-depth discussion of the suggested remedies.

The report also includes summaries of the eight luncheon series sessions. The wide range of issues discussed were:

* The implications of the new amendments to the 12-year-old Abuse Prevention Law;

* The granting of clemency for battered women imprisoned for killing their batterers;

* The police guidelines for responding to domestic violence;

* The need for domestic violence training for all personnel in the court system;

* The need for an integrated, multidisciplinary response to the problem of domestic violence;

* The role of the medical community in identifying and assisting victims of abuse;

* The implications of the family preservation concept for battered women and their children; and

* The efficacy of batterers' treatment programs.

The ninth session was devoted to a discussion of the development of a statewide domestic violence policy in Massachusetts and the recommendations for the report.

Much of the frustration voiced during the luncheon series sessions concerned the fact that, for the most part, people working in the field of domestic violence know what works. Luncheon participants acknowledged that there are model programs in Massachusetts and elsewhere which effectively involve the court system, law enforcement and the medical community in an integrated response to the problem. Therefore, further costly, intensive research into how to best respond is not necessary before attempting to replicate such programs. What we need to do now is to demonstrate a commitment to act, and to allocate the resources needed to replicate the programs that have a proven and demonstrated record of success.

The question has often been posed in this time of limited fiscal resources, "How can we afford to pay for preventing the violence?" My response is quite simple: we cannot afford <u>not</u> to pay. The price of inaction is thousands and thousands of more domestic violence victims suffering in silence, without the necessary support or help. I suggest that the most compassionate, efficient and effective response is to pay now for prevention, because, if we don't, we will eventually pay a higher price for prosecution and punishment at the "end of the line," when the tragedies have already occurred.

As noted in the report, the reality is that without a dramatic change in societal attitudes, we will continue to have future generations of individuals who have grown up in families where violence is present, and society will continue to bear the burden of the human and fiscal costs of that violence.

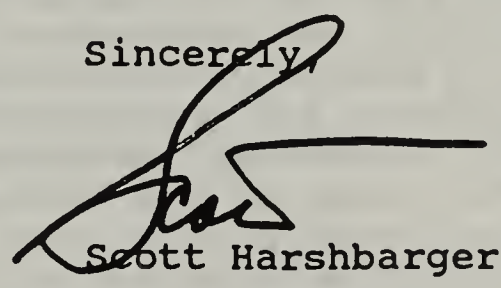
As members of the criminal justice and law enforcement community, I believe that we have responded more quickly and more effectively than any other profession, discipline or societal institution to the problem of domestic violence. In fact, we would be much further along in the prevention of

domestic violence if the rest of society had responded as well as the criminal justice system and law enforcement community.

I hope you, as members of the law enforcement and criminal justice community on the "front lines," will request a copy of the report, read it and offer your comments and suggestions. I look forward to continuing to work with you to implement the recommendations contained in the report and, thereby, to prevent the generational cycle of violence that has already claimed far too many victims.

I am confident that by working together we can continue our leadership on this critical issue and be successful in achieving this goal.

Sincerely,



Scott Harshbarger

Note: Copies of the report are available by calling Barbara Keating, of my Family and Community Crimes Bureau, at (617) 727-2200, or by writing to her at: Office of the Attorney General, One Ashburton Place, Boston, MA 02108.

SEARCH AND SEIZURE IN SCHOOLS
COMMONWEALTH v. CAREY and COMMONWEALTH v. SNYDER

by: Norah Wylie, Assistant Attorney General,
Family and Community Crimes Bureau,
John Scheft, Project Director, Elderly
Protection Project, and
Jeffrey Abramson, Special Assistant Attorney
General

In January 1985, the United States Supreme Court decided New Jersey v. T.L.O., a case concerning the law of search and seizure as it applies to public school officials. The central message of T.L.O. was that school officials may conduct a search of a student's person or possessions, so long as "there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." While T.L.O. answered the broad question about grounds for a legitimate search of a student by school officials, it left open other questions, such as whether the same "reasonableness" standard would apply to searches of lockers or desks assigned to students. In addition, the T.L.O. decision only answered the question of the reasonableness of the search under federal, as opposed to state, constitutional grounds.

Since T.L.O. the Supreme Judicial Court has, in the cases of Commonwealth v. Carey, 407 Mass. 528 (1990) and Commonwealth v. Snyder, 413 Mass. 521 (1992), provided answers to some of these questions. Because of the increasing incidence of violence within our schools, and the importance of school officials and police departments having a clear understanding of what steps they may take in investigating alleged violations of the law or school rules, this article discusses those cases and provides some guidance as to the conduct of searches of students and property.

In Commonwealth v. Carey, 407 Mass. 528 (1990), a case involving the presence of a gun on school property, the SJC upheld a search of a student's locker by school officials, finding that the search was reasonable under all the circumstances. The defendant in Carey was a 17 year old student at Woburn High School. On a Monday morning in March, 1987, Carey brought a sawed-off rifle to the high school and showed the weapon to two classmates. The classmates told their teacher, and the teacher immediately reported the information to school administrators. Although the teacher did not reveal the names of the reporting students to the administrators, he was

able to vouch for their credibility because he had been their teacher for a period of six months.

The school administrators then developed a plan to search Carey and the areas where he had been that day. If that search did not reveal the weapon, the administrators planned to then search Carey's locker. Because a firearm was involved, they telephoned the Woburn police. A police officer came to the school to insure safety, but had no input into the development of the search plan.

With the officer present, the administrators questioned and searched the defendant. When this, and a search of the defendant's most recent whereabouts failed to turn up the gun, a school administrator searched the defendant's locker and found the weapon concealed in a jacket. The weapon and jacket were then turned over to the police. At his trial in Woburn District Court, Carey filed a motion to suppress the rifle. The motion was denied.

The SJC applied the reasonableness standard announced in T.L.O. in reviewing the denial of the motion, finding that school administrators need not obtain a warrant or meet the standard of probable cause in order to search a student or campus area under their authority. The Court considered the eyewitness information provided by two reliable students, the defendant's involvement in a fight the Friday prior to the incident, and the failure to locate the gun either on the defendant or on school grounds, as an entirely reasonable basis for searching Carey's locker. The Court even said that the exigency created by the presence of a gun by a student on school grounds with school in session, as reported by eyewitnesses, may well have provided probable cause.

Equally important, the presence of a police officer during the search did not change the standard to require probable cause because school officials developed the plan for the search prior to contacting police, and carried out the search of the locker on their own. Thus, the Court refused to find that the presence of a police officer requires a higher showing when the officer's sole purpose in being present is to help school administrators execute the search safely.

The issue of whether a student has an expectation of privacy in a school locker was clearly addressed in Commonwealth v. Snyder, 413 Mass. 521 (1992). In Snyder, a school principal learned from a reliable, veteran faculty member that the defendant had asked another student if he wanted to buy

marijuana. The principal and other administrators saw the defendant in the school cafeteria, but because he was with several other students and they were hesitant to arose suspicions among the general student body, they decided initially to search the defendant's locker. They opened the locker by using a combination on file in the school office and found a package of marijuana. School administrators summoned the police after the defendant admitted that the marijuana belonged to him.

The Supreme Judicial Court upheld the trial court's denial of a motion to suppress the marijuana. In reviewing the denial, the Court first considered whether under either Article XIV of the Massachusetts Declaration of Rights or the Fourth Amendment, school employees needed a warrant to conduct a search of student lockers. The SJC held that absent an express school policy to the contrary, students have a reasonable expectation of privacy in their school lockers. The policy at issue in Snyder stated that school administrators acknowledged a student's right "[n]ot to have his/her locker subjected to unreasonable search." Such an explicit policy made it particularly clear that the defendant had a reasonable expectation of privacy in his locker.

Although students have a reasonable expectation of privacy in their lockers, the justices had "little difficulty in concluding that the search conducted without the authority of a search warrant [by school administrators] did not violate Snyder's rights" under either the federal or state constitution so long as the school employees were not acting as agents of law enforcement officials.

Snyder also discussed, but did not clarify, the level of information necessary under the Massachusetts Declaration of Rights to provide school officials with the authority to search students or places on campus. Yet, school employees must have some level of information to justify their search. The standard under the Fourth Amendment is whether the search was reasonable under all the circumstances. Here, the Court concluded that the school administrators had probable cause to search because the original information came from an identified student and was conveyed by a reliable faculty member to the school principal. Because the search met the higher probable cause standard, it clearly met the lesser standard of reasonableness articulated in T.L.O. as being applicable to school administrators. Furthermore, the scope of the search was proper since searching the locker was less intrusive than searching the defendant and, consequently, was reasonable under the circumstances.

In reaching its decision, the Court refused to decide whether the standard for school searches is the same under both Article XIV and the Fourth Amendment. While a search is never held to a lower standard than "reasonableness" nor a higher standard than probable cause, the Court indicated that it might announce a third, intermediate standard in the future.

A second issue raised in the Snyder case was whether school administrators were required to give Miranda warnings to the student when questioning him. The defendant argued that because school administrators did not inform him of his rights, this initial improper questioning tainted his later admissions to the police. The Court rejected this argument and stated that unless school administrators are acting as agents for or on behalf of law enforcement officers, they are not bound by Miranda requirements. The Court did note that as a matter of policy, when school officials intend to turn evidence seized in a school search over to the police, it would be prudent of the school official to inform the student that any statements made could be used against him. However, the Court declined to impose such a requirement on school administrators.

A reading of Carey and Snyder together provides additional guidance to law enforcement and school officials considering on-campus searches of students or property used by students during the school day:

1. The decisions apply only to searches initiated and conducted by public school officials. For security reasons, the mere presence of a law enforcement officer during a search does not convert school officials into law enforcement agents. If school officials act at the direction of police officers, however, they become law enforcement agents and are held to the higher standard of probable cause and the necessity, in some cases, to obtain search warrants.

2. Students have a reasonable expectation of privacy in their lockers, even though the lockers are school property. Schools should adopt clear, written policies which state that storage of contraband (e.g. weapons, narcotics, alcohol, stolen property) in school lockers is not permissible; that lockers are only provided for use consistent with legitimate school functions; and that lockers are subject to periodic inspections to insure compliance with these policies. In this way students will be on notice of a possible limitation of

their right to privacy, making courts more inclined to uphold the validity of locker searches.

3. Although a search of a student or his locker by school administrators is subject to a "reasonableness" standard under the federal constitution, the specific standard which applies under the state constitution remains unclear. While the standard is not higher than probable cause or lower than "reasonableness," it may be somewhere in between.

4. School officials are not required to give students full Miranda warnings when investigating violations of school rules that are also violations of the law. However, as a matter of policy when incriminating evidence has been seized and is to be turned over to the police, a school official who wishes to question a student about the incident should warn the student that any statement could be used as evidence against him or her.

CRIMINALIZING CONSUMER FRAUD

by: Patricia Bernstein, Chief Prosecutor,
Public Protection Bureau

Consumers throughout the Commonwealth of Massachusetts are continually being victimized by frauds and scams causing significant harm. Given difficult economic times, the business environment is quickly becoming a place for more than just unscrupulous business persons. Currently, we are seeing criminal conduct by scam-artists who intentionally prey upon and take advantage of unsuspecting consumers, representing that they will provide a product or service and disappearing or failing to deliver. Indeed as the number of complaints to the office of the Attorney General increase, they commonly involve home improvement fraud, tele-marketing scams, and health care fraud.

Traditionally, many consumer fraud matters have been handled by this office in the civil context. However, in light of the ever-increasing evidence of criminal conduct in this area, the Attorney General has created within the Public Protection Bureau the position of Chief Prosecutor to respond on an immediate basis to those cases which meet the burdens for criminal enforcement and where civil remedies may be inadequate. By developing a criminal capability in the Public Protection Bureau, the office is able to screen and investigate when appropriate those cases in areas previously geared toward civil remedies - consumer protection and charitable fraud. In this context, the office can determine early on what type of enforcement action or litigation will be most effective to present further fraudulent conduct.

In addition to the value which educational outreach accomplishes in the consumer area, the approach through criminal enforcement provides for the possibility of significant deterrence in terms of cost to defendants. Consequently, this office is committed to reviewing these situations for possible criminal treatment at the earliest opportunity as facts of a case develop. Particularly in those cases where civil injunctions and judgments have been ignored by defendants, or where defendants have spent their ill-gotten gains, charges of criminal contempt, larceny or other crimes may be applicable.

To that end, there is one relatively new tool available relative to home improvement contracting fraud which police departments should be aware of when receiving citizen complaints. In July, 1992, G.L. c. 142A, Regulation of Home

Improvement Contractors, went into effect. As of July 1, 1992, any person who owns or operates a contracting business or who undertakes residential contracting work, as defined by G.L. c. 142A, § 1, is required to register with the Bureau of Regulations and Standards as a home improvement contractor under § 9(a) of the statute. A knowing, willful or negligent failure to register is a criminal offense.

Residential contracting is defined in § 1 as any reconstruction, alteration, renovation, repair, demolition, or construction of an addition to any pre-existing owner occupied building containing at least one, but not more than four dwelling units, used as dwelling units. A "contractor" is anyone who owns or operates a contracting business for residential contracting work. Every residential contractor fitting this description is required to register with the Bureau of Building Regulations and Standards within the Office of Public Safety. Failure to register carries a penalty of up to two years imprisonment and a fine of $5,000.

Certain persons are exempt from the registration requirement pursuant to § 14. Those persons are described in that section and include among other contractors engaged in landscaping, interior painting, wall and floor covering.

In addition to the failure to register, contractors may also be prosecuted for other violations defined in §§ 2 and 17. For example, registered contractors are required to list their registration number on all ads and contracts. (Before entering into contracts, citizens should inquire whether or not contractors are registered.) In addition, contracts over $1,000 must be in writing and contain certain information, such as a complete description of the project, all payment schedules and figures, and the right to cancel within three days. A contract must inform the consumer that state law requires registration of contractors with the Bureau of Building Regulations and Standards.

Additional prohibited conduct is set out in § 17 and is punishable criminally for a knowing and willful violation. That conduct includes:

(a) abandoning or failing to perform, without justification, any project undertaken by a registered contractor or subcontractor, or deviating from or disregarding plans or specifications in any material respect without the consent of the owner;

(b) failing to credit to the owner any payment they have made to the contractor or his or her salesperson in connection with a residential contracting transaction;

(c) making any material misrepresentations in the procurement of a contract or making any false promise of character likely to influence, persuade or induce the procurement of a contract;

(d) knowingly contracting beyond the scope of the registration as a contractor or subcontractor;

(e) publishing, directly or indirectly, any advertisement relating to home construction or home improvements which does not contain the contractor's or subcontractor's certificate of registration number or which does contain an assertion, representation or statement of fact which is false, deceptive, or misleading;

(f) Regarding financing, the statute prohibits contractors from lending money or acting as an agent of a mortgage broker on behalf of a mortgage lender to finance the improvements.

(g) advertising in any manner that a registrant is registered under this chapter unless the advertisement includes an accurate reference to the contractor's or subcontractor's certificate of registration;

(h) violation of the building laws of the Commonwealth or of any political subdivision thereof;

(i) misrepresenting a material fact by an applicant in obtaining a certificate of registration;

(j) failing to notify the director of any change of trade name or address as required by section thirteen;

(k) conducting a residential contracting business in any name other than the one in which the contractor or subcontractor is registered;

(l) failing to pay for materials or services rendered in connection with operating as a contractor or subcontractor where the contractor or subcontractor has received sufficient funds as payment for the particular construction work, project or operation for which the services or materials were rendered or purchased;

(m) failing to comply with any order, demand or requirement lawfully made by the director or fund administrator under and within the authority of this chapter.

Any knowing and willful violation of these provisions is punishable by a fine of up to $2000.00 or imprisonment up to one year or both.

In addition to criminally enforceable provisions, § 5 of Chapter 142A creates a Residential Contractor's Guaranty Fund to compensate owners for actual losses incurred as a result of the conduct of a registered contractor which violates the statute or is performed in an unworkmanlike manner. In order to be eligible for any recovery from the fund, the consumer must obtain a judgment against a registered contractor, attempt to collect the judgment and make a claim against the fund within sixty days of the judgment. Note, however, that if the contractor is not registered with the Commonwealth, a consumer is not eligible to make this claim under the statute.

If police have questions about the new law and its applicability, they are encouraged to call the Consumer Protection Bureau of the Attorney General's Office.

A.G. OBTAINED JUDGMENT AGAINST DECEPTIVE FUND RAISERS

In addition to developing a criminal capability in the Public Protection Bureau by establishing the position of Chief Prosecutor, the Attorney General's Office is working in other areas to protect the citizens of the Commonwealth from being victimized by frauds and scams. In March, the Public Charities Division of the Attorney General's Office obtained court orders prohibiting a correction officers union and their fund raisers from masquerading as law enforcement officials, falsely representing the charitable purposes for which they are raising funds, or failing to disclose their professional fund raiser status to potential donors. The defendants are also required to pay $32,000 to the Attorney General's Local Consumer Aid Fund to assist local consumer groups and consumer education efforts. Suffolk Superior Court Judge Hiller Zobel issued the orders, which settle a lawsuit brought by the Attorney General's office in December against the union and their fund raisers, alleging that the defendants violated the state's charitable solicitation and consumer protection laws during their telephone solicitation of funds from Massachusetts businesses and residents.

The complaint alleged that employees of the fund raising companies misled potential donors to believe that they were correction officers calling to raise funds to purchase wide-screen televisions and VCR's for Massachusetts General Hospital and other hospital pediatric wards, and that they failed to inform donors of their status as professional fund raisers, as required by Massachusetts law. In addition, the union and one of the companies allegedly began the fund-raising campaign before they had registered with the Division of Public Charities, as required by Massachusetts law.

Josefina Martinez, of the Public Protection Bureau, and Assistant Attorney General Eric B. Carriker, of the Public Charities Division, handled the case for Attorney General Harshbarger. The case was investigated by Steve Svenson, Frank Gabrielle, Bryan O'Connell and Vanessa Sanchez, of the Civil Investigative Division, after Suffolk County Sheriff Robert C. Rufo reported his concern about the union's fundraising practices to the Attorney General's office.

FEDERAL COURT INVALIDATES PORTION OF STATE CORI LAW

by: Peter Sacks, Assistant Attorney General,
Administrative Law Division

On March 19, 1993, the United States District Court in Boston struck down as unconstitutional two specific portions of the Commonwealth's Criminal Offender Record Information Law (CORI). The case was Globe Newspaper Co. v. Fenton, Chief Administrative Justice of the Trial Court, No. 89-2868-WD (Woodlock, J.). After careful consultations with representatives of the court system, the law enforcement community, the Legislature, and others, the Attorney General has determined not to pursue an appeal. This article describes the two-part decision and its expected impact on law enforcement officials.

1. Access to Courts' Alphabetical Indices of Closed Criminal Cases.

Judge Woodlock's first holding was that G.L. c. 6, § 172 violated the First Amendment insofar as it barred the public from gaining access to the alphabetical indices of closed criminal cases maintained by the court clerks. In most of the courthouses of the Commonwealth, the only way to gain access to a closed criminal case files is to request the file by docket number. Ordinarily, the easiest way to obtain the docket number corresponding to a case involving a particular defendant, or to find out whether a person was ever a defendant in a particular court, would be to look up that person's name in the alphabetical index of closed cases in that court. But CORI prevented the public from using this index. Therefore, although case files themselves were in principle open to the public (unless sealed by specific court order), the closure of the alphabetical index made it difficult to search for and examine case files (if any) concerning particular individuals.

Previous U.S. Supreme Court cases had held that the First Amendment guarantees to the public a certain level of access to information about criminal trials and related proceedings. The Supreme Court based these holdings on the idea that the First Amendment right to speak out about the conduct of government officials (including judges, police officers, and prosecutors) would be an empty formality unless the public had some right to obtain first-hand information about what that official conduct

actually was. Judge Woodlock, relying on these Supreme Court decisions, determined that there could be no meaningful public access to closed criminal case files so long as a member of the public had no easy way of requesting the file on a particular individual. He therefore held that the First Amendment required the alphabetical indices of closed cases to be open to the public.

The immediate impact of this holding is essentially confined to the court system; court clerks must make the indices publicly accessible, but most other law enforcement officials are not faced with any new responsibilities. Prosecutors should be aware, however, that grand jury minutes and other such materials, which in the past were occasionally filed without being sealed on the assumption that the case file would for most practical purposes be inaccessible to the public, will now become more accessible unless filed under seal or otherwise impounded. Nothing in Judge Woodlock's decision restricts the courts' powers (1) to keep grand jury materials under seal, and (2) to impound all or portions of a case file based on the particular circumstances of that case. Motions for these purposes should still be filed in appropriate cases.

2. Sanctions for Disclosing CORI Material that is Contained in Publicly-Accessible Court Files.

Judge Woodlock also held that the CORI law could not be used to punish a public official for disclosing CORI material if, at the time of disclosure, that material was contained in a publicly-accessible court file. Judge Woodlock reasoned that, if information was already publicly accessible, the First Amendment barred the Commonwealth from punishing officials who chose to discuss that information with a member of the public.

This holding does not require law enforcement officials to disclose such material. Nor does it reclassify police, prosecutorial, or other non-court documents and databases containing CORI material as "public records," which would have to be disclosed pursuant to G.L. c. 4, § 7, cl. 26 and G.L. c. 66, § 10. The court files themselves are open to the public; the decision does not require any other law enforcement files to be opened, and the CORI law continues to restrict dissemination of those files. Members of the public who request information that they assert is already in a publicly-accessible court file may be advised to consult that file directly.

Moreover, it remains forbidden to disclose to an unauthorized person any CORI that is not in a court file, or CORI that is in a court file (or portion thereof) that has been sealed or impounded. This distinction is critical, because the Law Enforcement Automated Processing System/Criminal Justice Information System (LEAPS/CJIS) -- the computerized database maintained by the state Criminal History Systems Board and used by local police departments and other law enforcement officials to obtain criminal histories of specific individuals -- is based on, and contains information from, sources such as Board of Probation files, rather than court files. LEAPS/CJIS thus contains some information that is not in court files and may not be disclosed unless such disclosure is specifically authorized under the CORI law. Nor does LEAPS/CJIS distinguish between cases in which the court files are fully open to the public and cases in which part or all of the court file may have been sealed. For these reasons, disclosure to the public of information obtained from LEAPS/CJIS is risky. Such disclosure should be avoided unless it is absolutely certain that the information being disclosed is in fact currently accessible to the public in a court file.

Also, the user agreements under which many law enforcement officials obtain access to LEAPS/CJIS specifically provide that access may only be used to further legitimate criminal justice purposes. This means that disclosure to a member of the public of information obtained from LEAPS/CJIS is only proper where it serves such purposes. Disclosure for private or non-criminal-justice purposes is inconsistent with the user agreement and may be grounds for restricting or eliminating future access. The Criminal History Systems Board will continue to enforce the terms of user agreements, as well as the restrictions on the disclosure of CORI that is not currently contained in publicly accessible court files. For this reason as well, caution should be exercised before publicly disclosing any information from LEAPS/CJIS.

One other consideration in disclosing LEAPS/CJIS material is that LEAPS/CJIS contains information aggregated from courts all over the Commonwealth. Disclosure of this aggregated information is quite different than simply permitting interested members of the public to inspect court files in individual court clerks' offices. Indeed, the U.S. Supreme Court has ruled that disclosure of FBI "rap sheets" (aggregating a person's criminal history from courts and law enforcement agencies around the country) would constitute a "clearly unwarranted invasion of personal privacy," and was therefore not required under the federal Freedom of Information

Act, even if the individual pieces of information were available to the public at courthouses and police stations scattered around the country. U.S. Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989). Because the Commonwealth's public records laws also contain an exemption for material the disclosure of which "may constitute an unwarranted invasion of personal privacy," G.L. c. 4, § 7, cl. 26(c), LEAPS/CJIS material is not considered to be a "public record" and its disclosure is therefore not required.

Apart from LEAPS/CJIS, there is CORI material in the files maintained by individual law enforcement agencies, and the same rules govern disclosure of this material to any member of the public. Unless such information, at the time of the disclosure, is also contained in a publicly-accessible court file, its disclosure is governed by the CORI law. Unauthorized disclosure may be grounds for sanctions.

Questions on the use of information obtained from LEAPS/CJIS should be directed to the Criminal History Systems Board at 1010 Commonwealth Avenue, Boston, MA 02115, (617) 727-0090. Other questions regarding CORI may be directed to Assistant Attorney General Pam Hunt, Chief of the Criminal Appeals Division, at One Ashburton Place, Boston, MA 02108, (617) 727-2200. Questions specifically concerning Judge Woodlock's decision may be directed to Assistant Attorney General Peter Sacks at the same address and telephone number.

I. SEARCH AND SEIZURE

A. Searches Pursuant To Warrant.

1. Informants.

Probable cause can be established through mutually corroborative information from several informants who would not independently meet Aguilar-Spinelli standard. Commonwealth v. Luce, 34 Mass. App. Ct. 105 (1993). The defendant challenged the admissibility of evidence seized from his home pursuant to a search warrant in which the affiant relied upon statements from three informants. The first informant had recently been involved in drug transactions with the defendant at the defendant's home, and had seen cocaine in the defendant's home within the past five days. The Court concluded that this informant's information met the "basis of knowledge" test of Aguilar-Spinelli. The Court noted that the informant admitted to involvement in drug distribution, and gave the trooper names of people with whom the informant had been involved in such distribution, and that the trooper found the information to be accurate. The Court noted that, while this informant's "veracity" was questionable since he had never provided information in the past that led to convictions or seizures of narcotics, his veracity was bolstered by the facts that much of the information provided was corroborated, and that he had made statements against penal interest.

The other two informants had previously supplied information to police that resulted in convictions and seizures of narcotics, but their dealings with the defendant had occurred several months before the search warrant and their information was therefore relatively stale. Their information, however, corroborated the first informant's information about the defendant's drug distribution. While the defendant argued that probable cause had not been established because no single informant met both prongs of the Aguilar-Spinelli test, the Court held that the information from all the informant's was sufficient for a magistrate to make a determination of probable cause. The Court held that information supporting a finding of probable cause can consist of mutually corroborative materials or sources and need not come from a single individual or informant.

Reliability of informant not established by corroborating information that was easily obtainable by uninformed bystander. Commonwealth v. Motta, 34 Mass. App. Ct. 921 (1993). The defendant's conviction for trafficking in cocaine was reversed

because the reliability of the informant who furnished information for the issuance of a search warrant was not established. The affidavit in support of the search warrant stated that the informant had provided information in the past leading to the arrest of two named individuals for possession of cocaine with intent to distribute. The informant stated that a white male named Steve is dealing cocaine and has a kilo of cocaine at his house. The informant gave a physical description of "Steve" and Steve's car, and provided Steve's address. The officer confirmed that the address was occupied by a man named Steve, generally fitting the description given by the informant, that the officer saw a car fitting the description given by the informant in the yard at that address, and that the occupant of the house had been arrested for possession of cocaine and trafficking in cocaine.

The Court concluded that the facts independently corroborated by the affiant were not sufficient to establish the informant's reliability because they did not include specific details about the defendant that were not easily obtainable by an uninformed bystander.

2. Wiretap.

Application for wiretap not tainted by inclusion of information from prior invalid wiretap; separate applications not necessary for separate simultaneous intercepts; amendment to original warrant valid. Commonwealth v. Westerman, 414 Mass. 688 (1993). The defendant was convicted of trafficking in cocaine following an investigation which utilized court authorized wiretaps (voice intercepts as well as pen registers and cross frame units traps). See G.L. c. 172, § 99. The original wiretap warrant focused on the loansharking activities of a group of persons not including the defendant. The warrant was later amended to authorize the interception of conversations pertaining to drug trafficking among new suspects, including the defendant. The amended warrant was renewed twice by the supervising court. A subsequent search of the defendant's home pursuant to a search warrant led to the discovery of a quantity of cocaine and drug paraphernalia.

The Supreme Judicial Court ruled that the affidavit in support of the original wiretap warrant was not tainted by the inclusion of information obtained from an earlier wiretap warrant which had been deemed invalid. The Court indicated that the affidavit provided ample probable cause even absent the information obtained from the invalid warrant.

Next, responding to the defendant's claim that separate applications were necessary to authorize the pen register on one telephone line and the cross frame unit trap on a second line,

the Court ruled that the multiple wiretap warrant in this case was valid because the application "set[] out with particularity the necessity for both [intercepts]." In so ruling the Court held that separate wiretap orders are not required to authorize separate simultaneous intercepts so long as the probable cause and particularity requirements of G.L. c. 172, § 99, are met as to each intercept.

Finally, the Court ruled that an amendment to the original wiretap warrant in the present case was valid and authorized, notwithstanding the absence of an amendment provision in the wiretap statute. The Court said that an amendment to a wiretap warrant (like a renewal request) will be valid as long as the amendment application satisfies the same requirements of an application for a new or initial warrant, i.e., probable cause, necessity and particularity.

3. No-knock.

No-knock warrant was justified. Commowealth v. Rodriguez, 415 Mass. 447 (1993). A police sergeant, who had been a police officer for thirteen years and had participated in numerous investigations of narcotics distribution, applied for a no-knock warrant to search the defendant's home. In the affidavit, he stated that drug dealers often carry handguns, that the safety of the officers was a concern, and that a quick entrance would reduce the risk to them. He also stated that he had been at drug raids at which weapons were found and one at which a law enforcement officer was shot. He stated that the narcotics officers would be recognized by others in the area, who could warn the defendant, who could then destroy the drugs and escape. Finally, the affidavit indicated that an informant indicated that the defendant dealt in large quantities of cocaine and was "fronting" cocaine to be sold on the street, suggesting that the defendant was insulating herself from detection. The Court concluded that this information was sufficient to justify the issuance of a no-knock warrant.

The defendant also argued that, because surveillance at the time the officers executed the warrant indicated that the defendant was home alone, there was no need not to announce themselves. The Court noted, however, that the surveillance did not establish that only one person was present, nor did it militate against the fear that the evidence would be destroyed, and therefore the motion to suppress was properly denied.

B. Warrantless Searches And Seizures.

1. No search or seizure.

Parking a police cruiser near defendant's car and approaching the car on foot did not constitute an investigatory "stop". Commonwealth v. Doulette, 414 Mass. 653 (1993). During a routine check of a parking lot at 9:45 p.m., an officer noticed an interior light on in the defendant's car. After shining his cruiser spotlight on the vehicle he noticed the defendant looking straight ahead and a passenger bent over as if picking up something. The officer parked his cruiser beside the defendant's car, without blocking it. He walked to the car, and, using a flashlight, looked into the car's interior. He saw a razor blade and mirror covered with white powder. The officer seized the drugs and paraphernalia and charged the defendant with unlawful possession of a controlled substance.

The Court rejected the defendant's argument that the officer conducted an unconstitutional search and seizure by leaving his cruiser, approaching the defendant's car, and shining his flashlight into the car's interior. The Court noted that the officer neither stopped the defendant's car nor prevented him from leaving, and therefore the officer's actions did not constitute a "stop" merely because the defendant felt intimidated. The Court further held that the officer did not conduct a search by shining the flashlight into the car, and that his finding the drugs and paraphernalia was a "plain view" observation. The Court noted that the Fourth Amendment does not prohibit an officer from taking action when he or she is in a public place and observes evidence of a crime in plain view from a spot where the officer has a right to be.

2. Investigatory stops.

Defendant's sudden flight, and assault and battery on a police officer, provided independent justification for pursuit, regardless of whether initial stop was improper. Commonwealth v. Holmes, 34 Mass. App. Ct. 916 (1993). Two uniformed police officers stopped a vehicle for the purpose of returning the operator's registration certificate which they had earlier neglected to give back after a routine traffic stop. As the officers approached either side of the vehicle, they noticed the defendant seated in the passenger seat. The defendant leaned over toward the driver's side to speak with one of the officers. From his vantage point, the other officer, who was standing by the passenger door, noticed a bulge in the defendant's pocket which seemed shaped like a pistol. He asked the defendant to step out of the vehicle. Suddenly, the

defendant swung open the door, knocking the officer to the ground and fled down the street. He was eventually apprehended following a foot chase, and a pat-down frisk revealed the revolver. Prior to trial, the defendant moved to suppress the revolver.

The court held that the police officers' actions were proper. Regardless of whether the second stop may have been unnecessary and a pretext since the police could have mailed the certificate back to the driver and avoided the intrusion entirely, the defendant's sudden flight and assault and battery on the police officer gave rise to an independent justification for their pursuit. The defendant's flight and assault created a completely new situation so attenuated from the initial encounter as to wholly dissipate whatever initial taint resulted from the initial stop. The defendant's flight before the police began pursuing him, coupled with the officer's observation of the bulge in his pocket, provided an independent basis for the post arrest pat-down search.

Police had reasonable suspicion to conduct investigative stop of defendant suspected of armed robbery, and hold him handcuffed and at gunpoint, until witness arrived to make identification. Commonwealth v. Andrews, 34 Mass. App. Ct. 324 (1993). The day before the robbery of the Hanover Coin jewelry store, a Hanover police officer learned that two men had been casing a nearby jewelry store, and were driving the defendant's car. The day of the robbery, a clerk at the first store identified the defendant as one of the men who had been casing the store. When the robbery at the Hanover Coin jewelry store was reported, the same officer broadcast a description of the defendant's car and registration number as possibly involved in the robbery. While the officer was en route to the store, his dispatcher obtained from the victim a description of the two robbers, one of whom was wearing a dark shirt with a Coca Cola emblem on it. Another officer, who did not know of the victim's description, went directly to the defendant's home. The defendant arrived a short time later in the car described, with three other males in the vehicle, one of whom was wearing the described shirt. The officer blocked the car with his cruiser and held all four men at gunpoint for five or six minutes, until assistance arrived. The men were handcuffed and pat frisked, and were held approximately fifteen minutes until police arrived with the store employee, who identified two of the men as the robbers. All four men were then arrested.

The court held that the investigative stop was justified based on the collective knowledge of the Hanover officer and the officer who stopped the defendant and his cohorts. The court further held that, since the officer was acting alone facing

four men who may have committed an armed robbery, he was justified out of concern for his own safety and the safety of others to block the car and hold the four men at gunpoint. Moreover, although "more troublesome," the court concluded that handcuffing the defendant awaiting arrival of the victim was not impermissible since the police had reasonable suspicion that the defendant and his companions had committed an armed robbery minutes earlier, and had a legitimate concern for their own safety and their ability to control four potentially armed individuals.

3. Consent.

Police justified in making warrantless entry into apartment to arrest the defendant where tenant voluntarily consented to entry. Commonwealth v. Voisine, 414 Mass. 772 (1993). Noting that the police may not make a warrantless entry into the home of a third person to arrest a suspect or to search for evidence unless there are exigent circumstances or the third person consents to the search, the SJC concluded that there was consent for the entry in this case. At 8:30 a.m., five or six officers, with guns drawn, knocked on the door of an apartment where the defendant, who was wanted for a murder committed a week earlier, was suspected of hiding. They announced "police." The tenant opened the door, and the police said they were looking for the defendant and asked if she knew where he was. She pointed in the direction of the bedroom. The Court noted that the defendant was an overnight guest in the apartment and did not contribute to rent. The fact that the tenant pointed rather speaking is immaterial as long as the consent is voluntary and not coerced. In other words, the consent may be express or implied based on the circumstances.

Sixteen year old defendant consented to seizure of clothing and personal items during questioning by four officers at police station. Commonwealth v. Greenberg, 34 Mass. App. Ct. 197 (1993). Upon receiving information that the defendant had been with the murder victim a short time before the victim was found dead, the police went to the defendant's home on the evening of the incident. The police officers' seized a knife that was visible in the defendant's pants pocket when he opened the door. At the officer's request, the defendant and his father drove in their own car to the police station. With his father present, the defendant was questioned by several officers for an hour. No Miranda warnings were given. Upon questioning by the police, the defendant stated he would be willing to give them his clothing. The defendant and his father drove home in their car, with the police following. The police got the defendant's

clothes, then left. The defendant was not arrested until four days later.

The court concluded that the seizure of the knife was a reasonable self-protection measure, and, in any event, the knife was not tied to the murder. The court also concluded that Miranda warnings were not necessary, because the defendant was not in custody, because the investigation had not yet focused on the defendant, the defendant's father was present, the defendant traveled to and from the police station in his father's car, the atmosphere was informal, and the interrogation was not aggressive.

Finally, noting that the issue was capable of rational resolution either way, the court concluded that the defendant consensually gave physical evidence to the police. The court noted that the trial judge apparently disbelieved the defendant's testimony that he felt coerced, and noted that there was evidence that the officers were not aggressive or overbearing, the police said nothing to imply the defendant had to comply with their requests, there were no threats or trickery, and the defendant had some familiarity with criminal procedures. The court noted that the factors suggesting coercion, which were not dispositive, were the defendant's age (16), the presence of four police officers during questioning at the police station, the fact that no one told the defendant that he could refuse to turn the evidence over, and the defendant's testimony that he thought he had no choice.

4. Probable cause and exigent circumstances.

Exigent circumstances justified warrantless search of apartment where undercover officer had just seen cocaine. Commonwealth v. Collazo, 34 Mass. App. Ct. 79 (1993). An undercover State trooper entered an apartment to finalize the logistics of a drug transaction which the trooper had previously discussed with one of the defendants. When the trooper had purchased drugs from one of the defendants on earlier occasions, the transactions occurred in a vacant lot near the apartment. After some discussion about where the sale would take place, one of the defendants and the trooper left the apartment and went to the vacant lot. They eventually went back to the apartment, along with three other defendants. When they got back into the apartment, two of the defendants pulled cocaine from their pants pockets. The trooper tried twice to lure the defendant outside to complete the deal, but was unsuccessful. When the trooper left the apartment to get money for the transaction, the defendants noticed other undercover police and started to run. They were apprehended after a brief foot chase. Police then entered the apartment, arrested the defendants, and seized the drugs.

The Court held that probable cause to search the apartment arose when the trooper saw the two defendants remove the cocaine from their pants, and that exigent circumstances existed because the trooper did not anticipate where the transaction would take place until the drugs were actually produced, and after the Trooper saw the cocaine, it was impracticable to get a warrant.

Exigent circumstances existed to justify police looking in trunk of car and photographing dead body before obtaining a search warrant after civilian saw body and called police. Commonwealth v. Ghee, 414 Mass. 313 (1993). The defendant was arrested for drunk driving on Route 95 in Connecticut. A Connecticut State trooper arrested the defendant, and called for a tow truck. An employee of a tow truck company towed the defendant's car to the company's garage, and, smelling an odor from the trunk, opened the trunk and saw a body. Two Connecticut State troopers arrived, looked in the trunk and took pictures of the body, then obtained a warrant to search the car.

The SJC noted that, since there was no claim that the tow truck driver was acting on the direction of the police when he opened the trunk, his search, in which he found the body, presents no basis for a constitutional challenge. After he found the body, the police had probable cause to believe a human body was in the trunk. The Court concluded that exigent circumstances existed because of the need for prompt investigation of the report of a dead body in the trunk.

Note that although the search was conducted in Connecticut, the SJC applied Massachusetts state constitutional requirements to the facts.

5. Standing.

Defendant charged with drug distribution had no standing to challenge search of person to whom he just sold narcotics; drugs seized from locked mailbox should have been suppressed because defendant had privacy interest in mailbox. Commonwealth v. Garcia, 34 Mass. App. Ct. 386 (1993). During surveillance of an area known to be favored by drug dealers to hawk their wares, a police officer saw the defendant and another man, Rodriguez, walk into an apartment building after Rodriguez handed the defendant money. Rodriguez left the building alone, then put a small package in his pocket. Rodriguez drove away, and police stopped his car, searched him, and found four bags of cocaine in his pants pocket. Two other officers approached the defendant, who was standing in front of the apartment building. Another officer looked in the mailboxes in the hallway of the apartment building; only one of the boxes was locked, and the officer could see a magnetic key case through the slits of the mailbox.

One officer testified that it was common for drug dealers to hide narcotics in magnetic key cases. Officers searched the defendant, and found a mailbox key and $110 in cash. The police opened the mailbox, and inside the key case were three bags of heroin and two bags of cocaine.

The Appeals Court held that the defendant did not have standing to challenge the search of Rodriguez, since, to have automatic standing, the crime for which the defendant is convicted must have, as an essential element of guilt, possession at the time of the contested search. The court noted that possession by the defendant of the contraband seized from Rodriguez was not the subject of any complaint against him. The defendant was charged with distribution, and the Commonwealth was not relying on a claim that the defendant constructively or jointly possessed the cocaine he sold to Rodriguez. The court held that, once possession of the contraband ends, so does standing to contest the search. At that stage of the transaction, the defendant's interest is in the sale process-not the drugs.

The Court concluded, however, that the defendant had a reasonable expectation of privacy in the mailbox. The court noted that the receipt of mail is inherently private, and that the defendant clearly thought that he had a privacy interest, since he locked the mailbox. The court further stated that the fact that the defendant was not a tenant of the apartment building, and the hallway was accessible to the public, did not dilute the defendant's interest.

The court held that the search of the mailbox was not a valid search incident to the defendant's arrest because the mailbox was not within the defendant's immediate possession and control at the time of his arrest. The court also held that there were no exigent circumstances justifying the warrantless search, since there was no showing that the contents of the mailbox would soon be removed or that it was impracticable to get a warrant. The court noted that the search was conducted at 1:00 p.m., when courts are open, and there were at least four officers who could have secured the hallway while another officer obtained a warrant. Finally, there was no evidence that there were any accomplices.

II. ADMISSIONS AND CONFESSIONS

A. Waiver Of Miranda.

Where defendant initiated discussion about particular facts, and did not state unequivocally that he had nothing further to say, interrogation was constitutional. Commonwealth v. Costa, 414 Mass. 618 (1993). The Court upheld a first degree murder

conviction where the principal evidence against the defendant was a confession he gave to the police. After receiving information that implicated the defendant in a shooting, police questioned him briefly at his home and then asked him to go to the police station. He agreed. At the police station, he signed a form acknowledging that he had been advised of his Miranda rights. He was then questioned by several officers over the next three hours. During the interrogation, the defendant said that he did not want to be "a canary" and get a friend in trouble. The defendant testified that he told the officers several times that he had nothing further to say. The court, disbelieving the defendant's testimony, found that he never stated unequivocally that he had nothing further to say, and was forthcoming during the interrogation, including initiating a discussion of particular facts. The Court concluded that the police were therefore justified in continuing the interrogation until the defendant confessed.

Statements made to police were voluntary. Commonwealth v. Fryar, 414 Mass. 732 (1993). The SJC reversed the first degree murder conviction because the prosecutor challenged the only black member of the venire. However, the Court held that the judge properly denied a motion to suppress statements made by the defendant while in custody. The defendant made two sets of statements while in police custody. The police conceded that the defendant was 17 years old, had been drinking, was isolated for four hours without food or sleep, and was falsely told by the police that he was charged with stabbing the victim. When he gave the second statement, he had been handcuffed in a room for an additional four hours, alone and with no food or sleep. The Court concluded, however, that each statement was voluntary, relying on the facts that the defendant read a portion of the Miranda card out loud and signed it, appeared rational and coherent to the interrogating officers, and that he testified that although he consumed enough liquor earlier that evening to feel its effects, he did not feel intoxicated at the time of the interrogation.

The defendant further argued that his second statement, made after the police learned that the victim had died, should have been suppressed because it was obtained after the hour when overnight arrestees are usually arraigned and appointed counsel, and constituted an effort by the prosecution to interrogate him without the assistance of counsel. The SJC stated that there was no evidence that the police had intentionally delayed the defendant's arraignment, which took place late in the morning of the day of the defendant's arrest, and the police did not know until 7:30 a.m. that the victim had died.

Juvenile validly waived Miranda rights. Commonwealth v. Philip S., 414 Mass. 804 (1993). Philip S., who was nearly thirteen years old, was interviewed by Lawrence fire officials about an arson fire at his home in Lawrence. He was home alone when the fire started, and fire officials believed he might be involved. He voluntarily went to the fire station with his mother and was interviewed in the presence of his mother by uniformed fire officials and a plain clothes state police officer. When it became clear that the juvenile's description of the events did not make sense, the juvenile and the mother were advised of Miranda warnings; they both separately indicated they understood, and the mother signed the waiver provision on the Miranda card. The officers told the juvenile to tell his mother the truth and to tell the officers the truth, and then left. The mother and son were left alone for 10 minutes. The officers then resumed the questioning. When the juvenile was confronted with an inconsistency he became upset and ran from the room, and his mother brought him back for questioning. According to the state police officer, at this point the juvenile was the focus of the investigation. At the conclusion of the interview, which lasted for approximately an hour, one of the officers read the juvenile's statement to him and the juvenile and his mother signed the statement.

Two days later, a second interview was scheduled with different state police officers. Philip accepted a ride to the fire station from these officers. The juvenile and his mother were advised of the Miranda rights and individually waived those rights. They were given 10 to 15 minutes alone to discuss the rights. When the officers re-entered the room the juvenile and his mother signed a written waiver. A four hour interview took place, with a few breaks of varying duration. At the conclusion of the interview, the statements made by the juvenile were read and signed by the juvenile and his mother. The juvenile left the station in the company of his case worker because the mother did not want to take the juvenile home with her.

To support a conclusion that a juvenile validly waived his or her Miranda rights, the Commonwealth must show that a parent or interested adult was present, understood the warnings, and had an opportunity to explain them to the juvenile so he or she understands the significance of a waiver. The Supreme Judicial Court reversed the order allowing the juvenile's motion to suppress. The court noted that the issue of whether the adult accompanying the juvenile is an "interested adult" must be viewed from the perspective of the police officers. If, at the time of the questioning, if should have been reasonably apparent that the adult lacked the capacity to appreciate the situation, or was actually antagonistic to the juvenile, it could be concluded that he or she was not an "interested adult." Here,

however, the mother appeared to be concerned about her son, was attentive to the administration of the Miranda warnings, and appeared to understand them. The court noted that the mother's advice to the son to tell the truth did not make her a "disinterested adult."

The court also held that the Commonwealth does not have to prove that the juvenile and the adult actually consulted, but must show that they had an an actual opportunity to discuss the juvenile's rights. The Court noted that, at least for juveniles over the age of fourteen, there is no requirement that police give the juvenile and adult an unsolicited opportunity to confer in private, although providing a private place for consultation, as was done in this case, is clearly preferrable and advisable. The Court held that here, the fact that the juvenile and his mother were given 5-15 minutes of privacy to discuss the rights satisfied the requirement of an actual consultation with an interested adult.

Finally, the court held that there was nothing in the totality of the circumstances to suggest that the juvenile's statements were involuntary. His age and inexperience with police procedures alone were insufficient to conclude that his statements were not voluntary, where Miranda warnings were "scrupulously furnished, understood and waived."

B. Invocation Of Right To Remain Silent.

Defendant invoked right to remain silent in outburst of profanity after one question had been asked and answered; statement should not have been admitted at trial. Commonwealth v. King, 34 Mass. App. Ct. 466 (1993). Two police on motorcycles found the defendant in the woods with a six year old girl, standing, clothed, facing each other. When the police approached, the girl began to cry. When the police asked if anything had happened, the girl said she just wanted the defendant to take her home. The next day, she told a detective that the defendant pulled down her pants, then they heard the motorcycles and nothing else happened. The detective called the defendant into the police station for questioning. He gave the defendant Miranda warnings, then asked the defendant what he was doing in the woods with a six year old girl. The defendant said they were going to the park. The detective told the defendant that the girl said the defendant pulled down his underpants and hers. The defendant stood up and said, "You're a bunch of fucking assholes" and "I don't want to talk no more," and the interview ended. At trial, the judge allowed the detective to testify about the defendant's outburst.

The Court concluded that the detective should not have been permitted to testify about the defendant's statements, since the

outburst was the defendant's invocation of his right to remain silent. The court noted that since the only question asked and answered before the challenged remark was about a fact not in issue (the defendant's presence in the park with the girl), the only reason for introducing the evidence was to introduce the defendant's remark in which he invoked his right to remain silent.

Prosecutor improperly commented on defendant's failure to voluntarily provide physical evidence to the police. Commonwealth v. Martinez, 34 Mass. App. Ct. 131 (1993). The defendant was charged with and convicted of rape. The defendant testified at trial, and was vigorously cross-examined by the prosecutor on his failure to voluntarily come forward and provide blood and hair samples, and to turn over the underwear he was wearing on the evening the rape occurred. The defendant argued that the prosecutor's questions violated his right to remain silent. The Court held that, notwithstanding the fact that the defendant objected to only one of the prosecutor's questions, the prosecutor's line of questioning created a substantial miscarriage of justice because the case turned on credibility, and the prosecutor's suggestion that an inference of guilt could be drawn from the defendant's post-arrest, post-Miranda failure to come forward with information violated his right to remain silent. The Court noted that the police officers investigating the case did not attempt to obtain hair or blood samples from the defendant, nor did they ask him to voluntarily turn over the underpants he was wearing the night of the incident.

C. Error In Miranda Warnings.

Error in Miranda warnings, implying defendant had to talk about offenses for which he had not yet been charged, was error, but error was harmless beyond a reasonable doubt given the overwhelming evidence of defendant's guilt. Commonwealth v. Ghee, 414 Mass. 313 (1993). The defendant, being questioned about a murder, was given Miranda warnings by Connecticut State police which included the statement that he was "not obligated to say anything, in regard to this offense you are charged with but may remain silent." The Miranda form stated the defendant was charged with driving under the influence and operating a motor vehicle without a license. The court noted that, although no prescribed set of words must be used to provide the Miranda warnings, the warning in the present case arguably implied that, although the defendant did not have to talk about those charges, he did have to talk about offenses he was not charged with. The SJC found that, because there were no findings by the trial

judge on whether the Miranda warnings given the defendant reasonably conveyed his rights, the court was not willing to conclude that the Commonwealth met its burden of showing the defendant received adequate warnings. The Court concluded, however, that since there was overwhelming evidence against the defendant, any error in the warnings was harmless beyond a reasonable doubt.

Miranda warnings given when defendant was arrested did not carry over to later incomplete warnings given before questioning, where there was no indication defendant understood first set of warnings. Commonwealth v. Coplin, 34 Mass. App. Ct. 478 (1993). Police officers executed a no-knock warrant at the defendant's apartment. When they entered the apartment, the defendant was in the bathroom, and a bag of cocaine and money was floating in the toilet. The defendant and two other men were arrested at the scene, and, while they lay handcuffed on the floor, one of the officers announced all the Miranda rights. When asked at a hearing whether the defendant appeared to understand, the officer said "I got that impression."

Thirty or forty-five minutes later, the defendant was booked at the police station. At the booking desk, an officer repeated the warnings, but omitted the warning that anything the defendant said might be used against him in court. The booking sheet contained a statement that "I was informed of my right to remain silent, to use a phone, to call a lawyer, or to have one provided for me." The defendant signed under that statement. The form did not say "and anything I say may be used against me in a court of law." An officer took the defendant into a room for interrogation, and again repeated the Miranda warnings, leaving out the warning about use of the defendant's statements against him in court.

The Court concluded that the Miranda decision stresses that a warning about the consequences of speaking to police must be given before interrogation, and that the two warnings given at the station were improper. The Court also concluded that the complete set of warnings given at the scene did not carry over to the interrogation at the station. The court noted that when the complete warnings were given, the defendant, on command of armed police, was lying on the floor in handcuffs, and that it was therefore doubtful that he would have been thoughtful about the elements of the warnings. Moreover, the court noted that there was no evidence that the defendant understood the warnings. The court concluded that the second round of warnings did not work as a shorthand to incorporate the earlier warnings, where there was no indication by the defendant that he understood the first set of warnings.

III. NARCOTICS

A. Evidence Of Possession.

Newborn's medical records admissable in prosecution of mother for possession of narcotics during pregnancy. Commonwealth v. Pellegrini, 414 Mass. 402 (1993). The defendant was charged with possession of cocaine based in part on hospital records showing that her child was born with cocaine metabolites in her urine. The motion judge dismissed the charge on the ground that the defendant had a privacy interest in her child's medical records, and that use of the records in a drug possession prosecution violated the defendant's due process and privacy rights. On appeal, the Supreme Judicial Court held that the defendant does not have the same privacy right in her child's medical records as in her own, and that to allow a parent to exclude a child's medical records based on a claim of privacy may not be in the child's best interest. The court stated that relevant medical evidence concerning the treatment of a patient is admissible and does not raise an issue of privacy. The court did not decide whether evidence of cocaine metabolites in a newborn child's urine is sufficient to support a prosecution of the child's mother for drug possession.

Conviction for trafficking in cocaine reversed despite fact that defendant said she lived in apartment, and drugs and paraphernalia were found in kitchen. Commonwealth v. Brown, 34 Mass. App. Ct. 222 (1993). The defendant was convicted of trafficking in cocaine in an amount greater than twenty-eight (28) grams. The issue on appeal was whether there was sufficient evidence to prove that the defendant had the ability and intention to control cocaine seized during the search of an apartment, in which the police seized a variety of evidence including the following from the kitchen: a bag found on the window sill containing 40.38 grams of cocaine and two smaller bags ready for street sale, two boxes of sandwich bags, a bag filled with cut-off corners of sandwich bags, an electronic scale, a strainer with white residue, and a bowl of Inositol. Before the search, the police had also made two controlled buys of cocaine from the apartment.

In concluding that the Commonwealth had not proved the defendant possessed the cocaine, the court held that the Commonwealth had only proved the defendant's presence where the drugs were found and her awareness of the drugs, which alone are not sufficient evidence to support an inference of ability and intention to exercise control of the drugs, despite the fact that the defendant said she lived in the apartment, and some of her personal effects and papers were there.

B. Evidence Of Intent To Distribute.

Expert can testify that amount of cocaine is consistent with distribution and not with personal use. Commonwealth v. Cordero, 34 Mass. App. Ct. 923 (1993). In a trial for trafficking in cocaine, a police officer testified that in his expert opinion the amount of cocaine involved was not consistent with personal use but rather was indicative of distribution. The Court noted that issues relevant to possession and possession with intent to distribute are not within the realm of common experience. The court held that although an expert cannot offer an opinion as to the ultimate guilt or innocence of a defendant, he or she can respond to hypothetical questions relative to an issue for the jury which do not cause the witness to comment on the defendant's guilt or innocence.

The Court also held that a certificate of analysis is admissible as prima facie evidence of weight even without independent proof that the Commonwealth requested the chemist to determine the weight of the drugs.

Evidence that defendant possessed 25.6 grams of cocaine in motor vehicle on state highway sufficient to support inference on intent to distribute. Commonwealth v. Roman, 414 Mass. 652 (1993). The Court found the following evidence sufficient to support an indictment charging trafficking in cocaine on the theory that the defendant possessed the drugs with intent to distribute. A state trooper saw the defendant's vehicle come off the Massachusetts Turnpike in Auburn onto Route 12. Because the defendant was driving erratically, the trooper stopped him and asked if there was a problem. The trooper noticed that the defendant was nervous. The trooper asked the defendant for his license and registration, and the defendant produced a suspended Connecticut license. The trooper ordered the defendant out of his car and placed him under arrest. The trooper patted the defendant down for weapons and felt a large bulge in a pocket of the defendant's pants. He reached in the pocket and discovered a bag of white powder. The powder was sent to a laboratory for analysis, where it was determined to be 25.6 grams of cocaine.

The Court noted that there was no question that the defendant possessed the cocaine; the issue was whether possession of 25.6 grams supported an inference that the defendant intended to distribute. Calling the question a "close one," and noting that the evidence may not support an inference beyond a reasonable doubt, the Court held that possession of 25.6 grams of cocaine in a motor vehicle on a state highway warranted a reasonable inference that the defendant intended to distribute the cocaine.

The Court also held that the trooper's failure to inform the grand jury of the defendant's self-serving statement that the cocaine was for his personal use did not greatly undermine the validity of the evidence presented.

C. Manslaughter Charges.

Defendant who purchased heroin for known user could be tried on charge of involuntary manslaughter. Commonwealth v. Perry, 34 Mass. App. 127 (1993). The defendant, a heroin addict, arranged the purchase of ten bags of heroin for a friend, Michael Moscuzza. The defendant knew Moscuzza to be a heroin addict, and had previously purchased heroin for him. The defendant, Moscuzza, and two others drove to Providence to buy the heroin. Prior to their arrival, Moscuzza gave the defendant the money for the purchase and promised her one bag for her part in the transaction. In Providence, the defendant called her dealer and arranged for the deal to take place in a gas station parking lot. The dealer appeared and supplied the defendant with the heroin. The defendant gave the heroin to Moscuzza, and kept one bag per their agreement. Moscuzza injected himself with four of the bags and died. Evidence was presented that the defendant injected another passenger with some of the heroin.

The defendant was indicted for involuntary manslaughter and illegal possession of a hypodermic needle, and challenged the sufficiency of the evidence presented to the grand jury which returned the indictment. The Appeals Court held that the evidence presented to the grand jury, as outlined above, was sufficient to support an indictment for involuntary manslaughter based on the defendant's wanton and reckless conduct. The court noted that the defendant was instrumental in providing Moscuzza, a known heroin addict, with heroin, and that, given the high mortality rate associated with heroin use, the variability in heroin concentration, and the fact that any substantial quantity of heroin injected regularly could easily contain a lethal concentration, it was not unreasonable to conclude that injecting heroin constitutes a substantial and unjustifiable risk of death. The court also noted that the defendant herself was aware of the lethal risk of heroin use.

PLEASE NOTE THAT THIS IS NOT THE FINAL WORD ON THIS MATTER. The Supreme Judicial Court has granted further review, and will review the Appeals Court decision.

D. Random Sampling.

Random sampling of small packets of drugs to determine average weight per packet is proper way to calculate net weight. Commonwealth v. Coplin, 34 Mass. App. Ct. 478 (1993). One of the bags of cocaine found by the police during the execution of

a search warrant contained 174 aluminum foil packets of small amounts of cocaine. The chemist weighed the contents of twenty packets chosen at random, calculated the average weight per packet, then multiplied that average by 174 to obtain the net weight. The Court concluded that this was a proper way of determining the weight of the drugs.

IV. MOTOR VEHICLE

Statute allowing officers to give either written warnings or citations for civil motor vehicle infractions is not unconstitutionally vague. City of Cambridge v. Phillips, 415 Mass. 126 (1993). A police officer saw the defendant make an illegal left turn. The officer cited her for a motor vehicle infraction, rather than directing that a written warning be issued to her. The defendant argued that the statute which governs motor vehicle infractions is unconstitutionally vague because it gives police officers observing infractions to give either a written warning or a civil citation to the driver.

The Court noted first that the statute was not vague as to defining what conduct is criminal and the consequences of a violation. The Court also held that the statute did not unconstitutionally delegate a basic policy matter by giving officers the option of either giving a warning or citing the violater for an infraction. The Court stated that police officers act as prosecutors as a practical matter in presenting infractions to a clerk-magistrate or judge, and therefore are entitled to a broad amount of discretion in that determination. The Court noted that in the absence of a claim of discriminatory enforcement of the law or some other improper exercise of discretion, the judgment of the "cop on the beat" is not subject to constitutional challenge where the range of available options is as narrow as in the present case.

Failure to provide notice mentioned in G.L. c. 90, §24O does not preclude imposition of mandatory penalty when convicted of driving after revocation. Commonwealth v. Dowler, 414 Mass. 212 (1993). The defendant pled guilty and was sentenced on a charge of operating under the influence (second offense). The defendant gave his license to the court clerk. Later, he received notice from the Registry of Motor Vehicles that his right to operate was revoked for one year. He did not receive the notice mentioned in G.L. c. 90, §24O, which outlines the statutory provisions that apply to any further violation of c. 90. The defendant thereafter was arrested and convicted for driving after revocation for an alcohol-related driving offense and was sentenced to the mandatory 60 day imprisonment and $1,000 fine.

On appeal, the defendant claimed that the failure of the Commonwealth to provide him with the §240 notice when his license was originally taken precluded him from being sentenced to the mandatory penalty. The Court held that section 24 does not add an element to any crime in c. 90, nor does it purport to create a defense if notice is not provided. Pointing out that the defendant was on notice that his right to operate was revoked for one year, the Court noted that §240 was enacted to provide only an additional warning to defendants who have been convicted of alcohol-related motor vehicle offenses. That purpose is subsidiary to the main function of the Safe Roads Act, to improve public safety by removing drivers under the influence of alcohol from the Commonwealth's roads.

Motorist is required to stop and make self known after accident regardless of who was at fault. Commonwealth v. Robbins, 414 Mass. 444 (1993). The defendant drove away from a bar with the victim as his passenger. The truck suddenly swerved, continued for about one hundred yards, and then stopped in a driveway. A witness, who was driving behind the defendant's truck, said that as he drove by the place where the defendant's truck swerved, he saw the victim's body. He stopped his car and walked toward the defendant's truck, and the defendant told him the victim jumped out in front of him. The defendant returned to his truck and drove away. The Commonwealth's theory was that the injuries were caused by a collision between the victim and the defendant's truck. The defendant's theory at trial was the victim died when she jumped out of his truck while he was moving. The defendant was charged with leaving the scene of a motor vehicle accident without making himself known.

The defendant argued that he should be found not guilty because G.L. c. 90, §24(2)(a), which requires an operator of a motor vehicle to make known his or her name, residence, and motor vehicle registration after knowingly colliding with or causing injury to any person, only applies to a driver who is at fault. The Court held that the Legislature did not intend that the statute apply only to a driver who was at fault, because to do so would require an operator involved in an accident to make an immediate and accurate assessment of his fault in order to know if the statute applies to him. The statute applies whenever an operator of a motor vehicle in some way contributes either to the collision or to the resulting injuries.

Court dismissed complaint for operating to endanger where defendant was served with citation four days after accident occurred. Commonwealth v. Cameron, 34 Mass. App. Ct. 44 (1993). On April 27, 1988, a police officer was called to the

scene of a motor vehicle accident. When he arrived, he saw a car parked perpendicular to the curb; the windshield was smashed and there was damage to the front end and roof. A seriously injured teenage boy, and his bicycle, were lying in the road. The officer administered first aid and called an ambulance for the boy. The defendant, who had run behind a house, and appeared to be in shock, gave the officer his license and registration. He was taken home by a friend. A witness at the scene told the officer that the boy suddenly turned into the oncoming lane, and the defendant, unable to stop, struck him. The officer investigated the scene, and later in the evening learned that the boy's condition was serious, and he thought the boy might die. The following day, the officer continued his investigation, and concluded that the defendant was traveling over the speed limit and crossed the double line prior to hitting the boy. The officer was off duty the next two days, April 29 and 30. On May 1, the officer learned that the boy's condition had stabilized, and called the defendant to tell him that a citation would be issued for operating to endanger and other offenses.

Where a defendant files a motion to dismiss on the grounds that a citation was not issued at the time and place of the alleged violation, the Commonwealth has the burden of establishing that one of the exceptions set forth in G.L. c. 90C, §2, justified the delay in issuing the citation. The exceptions to the citation requirement are where the violator could not have been stopped, or where additional time was reasonably necessary to determine the nature of the violation, or where the court finds that some other circumstance that does not contravene the policy of the statute justified the delay. The purpose of the citation requirement is to prevent corrupt manipulation, and assure early notice to the offender.

Here, the Court concluded that the officer had sufficient information at least by the day after the accident to issue the citation, and that it therefore need not decide whether the officer's two days off would have justified the delay. The court noted that the officer misapprehended the law in believing he had to wait until he ascertained the boy's condition to issue the citation, and that his misapprehension was not a justification for the delay. Finally, the court noted that the defendant need not show that he was prejudiced by the delay.

PLEASE NOTE THAT THIS IS NOT THE FINAL WORD ON THIS MATTER. The Supreme Judicial Court has granted further review, and will review the Appeals Court decision.

V. IDENTIFICATION

Defendant entitled to instruction that one-on-one identifications are less reliable than line-ups where officer who conducted surveillance identified defendant minutes later. Commonwealth v. Cuffie, 414 Mass. 632 (1993). The defendant, Cuffie, and another individual, Person, were under police surveillance as they sold cocaine in front of a house. A police officer watched them from inside a car through binoculars at a distance of somewhat less than 100 feet. After the police officer observed three transactions during the course of ten minutes, the police moved in. They caught Person but Cuffie managed to flee. The officer who had conducted the surveillance broadcast a description of Cuffie: black male, who is five feet, nine to ten inches tall, wearing a tan sheepskin three-quarter length jacket with fur trim. Another police officer spotted a man answering that description running in an alley less than one-tenth of a mile from the surveillance location. The police officer apprehended Cuffie and returned to 189 Quincy Street where the officer who had conducted the surveillance identified him as the man who had been selling drugs with Person. Cuffie's right rear trouser pocket contained 1.32 grams of crack cocaine.

Cuffie's defense was misidentification: the police had the wrong man. He testified that on the day of his arrest he had been riding around with a friend, Parker, who also testified at trial, had purchased a box of chicken wings and was hurrying to deliver these to a cousin who lived near the place where he was apprehended. Cuffie also testified that Person was a total stranger to him and that the cocaine in his back pocket was for his own use. Person testified that he did not know Cuffie and that Cuffie had never participated in drug dealing with him.

The Supreme Judicial Court held that the defendant was entitled to an instruction indicating that an identification, based upon a one-on-one confrontation is less reliable than an identification from a line up.

The Court also found that the portion of the standard jury instruction on mistaken identification, as enunciated in Commonwealth v. Rodriguez, 378 Mass. 296 (1979), which states that "you may also consider the length of time that lapsed between the occurrence of the crime and the next opportunity of the witness to see the defendant, as a factor bearing on the reliability of the identification," was unduly suggestive, and changed the pattern instruction.

Photo array was not unnecessarily suggestive. Commonwealth v. Smith, 414 Mass. 437 (1993). Police showed the victim 300 photographs which did not include a picture of the defendant.

The victim picked out a photo which she said was not her assailant but looked like him. She then helped the police prepare a composite drawing of her assailant. A few days later, the police showed her an array of eight photographs, including the defendants. The defendant's picture was the only one in the array which was not included in the original 300 photographs the victim viewed. She picked out the defendant's photo from the array and said that it looked like her assailant. The defendant was arrested and photographed. The police then showed the victim another array of eight photos, including the new picture of the defendant. She picked out the defendant and said that he was her assailant. At trial, the victim identified the defendant as her assailant, and identified the two pictures of him as the ones she picked out of the arrays.

The defendant argued that the first photo array was unnecessarily suggestive because the defendant's photo was the only one not previously shown to the victim. The Court held that the photo array was proper, noting that it is far from clear that the victim would have noticed that only the defendant's photo was being shown to her for the first time.

VI. MISCELLANEOUS

A. Police Officers' Jurisdiction.

Officer had authority to arrest defendant in another jurisdiction based on fresh-pursuit statute. Commonwealth v. Owens, 414 Mass. 595 (1993). A Quincy police detective saw a Cadillac and a Lincoln automobile parked in a high-crime area of Quincy used as a dumping ground for stolen vehicles. The detective requested a stolen vehicle check and a warrant search for the Cadillac; he received information that the car was not stolen, but that there was an outstanding warrant for serious felony charges against the owner. He did not get a description or date of birth for the owner.

The detective saw the defendant and a woman get in the Cadillac. As he approached the two cars, they drove off. He followed the Lincoln and tried to get its plate number. The Cadillac was behind the detective's car. The detective radioed for another cruiser to stop the Cadillac at a specific traffic light, but the defendant stopped at a gas station located just over the Quincy-Boston line in Boston before getting to the designated light.

The detective approached the Cadillac, identified himself, and conducted a pat-down search of the defendant's outer clothing. He felt a bulge in the defendant's waist. The defendant said he had a gun. The detective reached in and

pulled out a .32 caliber revolver, and found in the defendant's pocket a magazine containing ammunition that did not fit the revolver. The detective then opened the trunk of the Cadillac, saw a shotgun, immediately closed the trunk, and placed defendant under arrest. At the station, an inventory search of the vehicle revealed more guns, ammunition and drugs in the trunk. The defendant was convicted of trafficking in heroin and several firearms charges.

The Court ruled that the Quincy detective had jurisdiction to arrest the defendant in Boston. He had probable cause to believe, absent any indication otherwise, that the driver of the Cadillac was the owner, who was wanted for serious felony charges. Therefore, he had reason to believe the defendant had committed an arrestable offense when he began his pursuit. Since he received the information about the outstanding warrant in his own jurisdiction, the fresh-pursuit statute (G.L. c. 41, § 98A) gave him jurisdiction to stop and arrest the defendant in Boston.

The Court also ruled that the scope of the search was proper. The detective was warranted in conducting a pat-down search for weapons, since he reasonably believed that he was confronted with a dangerous felon. Finding the illegally-possessed revolver, he had probable cause to arrest, and search further. Once he discovered the firearm and the non-matching ammunition, he had probable cause to search the vehicle for other weapons.

Police officers responding to another officer's informal request for assistance in another town pursuant to a mutual aid agreement were "engaged in the performance of their duties" for purposes of the crime of assault and battery on a police officer. Commonwealth v. McCrohan, 34 Mass. App. Ct. 277 (1993). The only police officer on duty in Berkeley, who was the commanding officer on his shift, radioed his dispatcher to check the status of a license, but the computer was down. Two Freetown officers overheard the communication and offered to get the information from their dispatcher. The Freetown officers then went to the scene in Berkeley. When the three officers approached the defendant, a fight ensued, and the defendant was ultimately charged with and convicted of two counts of assault and battery on the Freetown officers. The defendant argued that the Freetown officers were not "police officers" within the assault and battery statute because they were outside their jurisdiction at the time.

The Appeals Court noted that in determining whether the defendant was guilty of assault and battery on a police officer, the issue was not the Freetown officers' power to arrest in Berkeley, but rather whether they were "engaged in

the performance of their duties." The Appeals Court held that the mutual aid agreement between the two towns gave the Freetown officers the powers of Berkeley officers, and they were therefore engaged in the performance of their duties at the time of the assaults.

The Court noted that, given the fact that the Berkeley and Freetown police departments are very small, and the "frequently fleeting and emergency nature of many situations that confront police officers, even in bucolic communities," the mutual aid agreements should be read so as to allow for informality and flexibility. Therefore, the Court acknowledged as an acceptable method of implementing mutual aid agreements the practice of an officer of one town requesting aid from an officer from another town who happens to be passing through, and rejected the defendant's argument that the mutual aid agreement required that the Berkeley department make a formal request to the Freetown department, which must then formally process the request.

B. Prosecutions.

60 day limit for filing motions to revise and revoke cannot be waived by agreement between defendant and prosecutor. Clark, petitioner, 34 Mass. App. Ct. 191 (1993). At Clark's sentencing, the prosecutor and defense counsel agreed to waive the 60 day limitation for a defendant to file a motion to revise and revoke a sentence, and jointly support a motion to revise and revoke if the defendant behaved himself for 3 years of a 9-10 year state prison sentence. The Court ruled that this agreement was invalid, emphasizing that a motion to revise and revoke must be filed in writing by the defendant within 60 days of imposition of a sentence, and that the procedure cannot be waived by agreement of the defense counsel and prosecutor.

The Court noted that the purpose of Rule 29, which governs the revise and revoke procedure, is to permit a judge to reconsider the sentence imposed in light of facts existing at the time of sentencing, not events that occurred after sentencing such as the good conduct of the defendant while in prison. Rule 29 is not a substitute for a parole board, as was contemplated by the agreement between the defendant and prosecutor in this case.

A child under the age of fourteen may commit rape. Commonwealth v. Walter, 414 Mass. 714 (1993). A thirteen year old juvenile was charged with being delinquent by reason of rape and abuse of a child under sixteen years of age. The juvenile moved to dismiss the charge on the ground that under common law a child under fourteen years of age is presumed

incapable of committing rape. The SJC concluded that there is no presumption in Massachusetts that a child under the age of fourteen is incapable of committing rape. The Court's ruling was based on the fact that there is no sound legal or medical basis for a presumption that an individual under fourteen is incapable of rape. The Court held that their decision that there is no presumption is applicable to acts committed after March 16, 1987, the date in which the Court indicated in Commonwealth v. A Juvenile, 399 Mass. 451 (1987) that the English common law presumption had never been expressly adopted in Massachusetts.

Rule permitting prosecutor to remain in grand jury during deliberations and voting, upon request of grand jurors, does not violate federal or state constitution. Commonwealth v. Smith, 414 Mass. 437 (1993). Mass. R. Crim. P. 5(g) permits a prosecutor to be present during grand jury deliberations and voting upon request of the grand jurors. The defendant raised a constitutional challenge to Rule 5(g), contending that the procedure of permitting a prosecutor to remain during grand jury deliberations and voting impaired the integrity of the grand jury, violating the due process clauses of the federal and state constitutions.

The Court held that nothing in the federal Constitution prohibits a state from permitting a prosecutor to remain during state grand jury deliberations and voting. The Court concluded that the federal procedure under Fed. R. Crim. P. 6(d) (which precludes anyone but grand jurors from being present during deliberations and voting) is not binding on Massachusetts because it is a procedural, not a constitutional, rule, which states are not bound by principles of due process to follow. The Court cautioned that under Massachusetts procedure a prosecutor who remains by grand jury permission must keep silent unless his or her advice or opinion is sought. A prosecutor may not participate in the grand jury's deliberations or express opinions on questions of fact, nor can a prosecutor attempt to influence the grand jury's decision. A prosecutor's duties are limited to putting the evidence before the grand jury and explaining the meaning of the law.

The Court also held that permitting a prosecutor to remain upon request during grand jury deliberations and voting does not violate Article 12 of the Massachusetts Declaration of Rights because it does not conflict with the essence of grand jury procedure practiced in England, as its purpose is to protect the integrity of the grand jury.

Defendant sanctioned for civil contempt for violating restraining order can be criminally charged with violation of same order. Mahoney v. Commonwealth, 415 Mass. 278 (1993). The District Court issued a series of protective orders ordering that the defendant refrain from abusing his wife and his girlfriend and stay away from their households. Thereafter, criminal complaints were issued charging the defendant with assault and battery on his wife, and with violating a protective order and making threats against his girlfriend. At the arraignment, the judge held a contempt hearing to decide whether the defendant's conduct violated the protective orders. G.L. c. 209A provides that the court can enforce a violation of a restraining order by civil contempt procedure. The defendant did not object to the contempt hearing procedure as announced by the judge, and was given one and one-half hours to prepare for the hearing. The judge found the defendant in contempt, and at sentencing, ordered the defendant committed to jail for thirty days, but provided that he could purge himself of the contempt by posting $5000 in cash on the condition that he have no contact with either complainant. Before the trial on the criminal complaints, the defendant filed a motion to dismiss on the ground of double jeopardy, arguing that he was receiving multiple punishments for the same crime.

Noting that the issue was whether the judge "punished" the defendant in sanctioning him for the contempt, the SJC concluded that the sanction imposed on the defendant was not punishment, but was civil in nature, specifically designed to compel compliance with the protective orders. The Court noted that the sentence of imprisonment was not for a definite period, but was structured so the defendant could purge himself of the sentence by posting the cash and having no contact with the complainants. The Court also held that because the cash-posting requirement was conditioned on the defendant's compliance with the court order, it was not a "fine," and was therefore a proper civil contempt sanction.

The Court also concluded that the intent of c. 209A is to provide speedy intervention by the courts in domestic disputes to protect the health and safety of domestic partners. Therefore, since the defendant was given notice, was represented by counsel, and was afforded an opportunity to be heard, the judge did not have to follow the more time-consuming procedures for civil contempt proceedings set out in Rule 65.3 of the Massachusetts Rules of Civil Procedure.

Bail bondsman from another state cannot seize bailed individual at any time, but must comply with Uniform Criminal Extradition Act. Commonwealth v. Wilkerson, 415 Mass. 402 (1993). The

defendant, a bail bondsman from Oklahoma, apprehended an individual who broke the terms of his bail in Oklahoma and fled to Massachusetts. The defendant took the individual against his will back to Oklahoma. The defendant was charged with kidnapping and assault with a dangerous weapon. The defendant wanted to raise the defense of "lawful authority" because, at common law, bail bondsmen could seize a bailed individual in any state at any time without resort to the legal system.

The Court held, however, that the Uniform Criminal Extradition Act, which permits any credible person, such as a bail bondsman, to request the arrest of an alleged fugitive without a warrant, and requires certain procedural due process protections for persons arrested as fugitives, supercedes the bondsman's common law right. Therefore, bail bondsmen cannot seize bailees at will, but must comply with the procedural requirements of the Uniform Act, and cannot rely on the common law as a defense to charges such as those in this action.

Amendment to bail statute, allowing official authorized to admit persons to bail to refuse release if it would endanger the safety of another person or the community, is unconstitutional. Aime v. Commonwealth, 414 Mass. 667 (1993). Aime was arrested for possession of a class B controlled substance with intent to distribute. At his bail hearing, the district court judge set bail at $100,000 cash or $1,000,000 surety. In doing so, the judge invoked one of the recent amendments to the Commonwealth's bail law, G.L. c. 276, §58, allowing the judge to refuse to release an individual if the judge determines that release would endanger the safety of any other person or the community, and mandating that the judge take into account the nature and seriousness of the danger to any person or the community posed by the prisoner's release in setting the amount of bail. Prior to the amendments, the judge could refuse to release an arrestee only if the judge determined that release would not reasonably assure the arrestee's appearance in court.

The SJC concluded that the amendment to the bail statute violates the Due Process Clause of the Fourteenth Amendment, since application of the amendment essentially established preventative detention of arrestees who are merely suspected of being dangerous without affording adequate and necessary procedural and substantive protections, such as requiring clear and convincing evidence that the arrestee's release would endanger the community.

C. Police Departments.

Police chief may properly consider circumstances surrounding convictions for which individual received pardon when considering application for license to carry firearm. DeLuca v. Chief of Police of Newton, 415 Mass. 155 (1993). The chief of police denied DeLuca's application for a license to carry a firearm based on his past involvement in violent and improper activities, including a shooting, which led to his conviction for manslaughter, and his impersonation of a police officer. Following his convictions, however, the plaintiff received a full pardon. Four months after the pardon, G.L. c. 127, § 152 (the statute dealing with pardons) was amended to provide that all records relating to a pardoned offense must be sealed, and cannot be used to disqualify a person from obtaining, among other things, licenses. In the letter denying the plaintiff's application, the chief clearly stated that the denial was not based on the plaintiff's convictions, but on the circumstances surrounding the convictions.

The Supreme Judicial Court held that G.L. c. 127, § 152, applied only to cases where individuals were pardoned after the statute was enacted, and thus, the plaintiff's criminal records did not have to be sealed at the time the application was reviewed. In any event, where character is a necessary qualification to obtaining a firearm license, the chief of police was entitled to consider the acts underlying the pardoned offense, notwithstanding the pardon.

"Public duty" rule is to be discarded following 1993 legislative session. Jean W. v. Commonwealth, 414 Mass. 496 (1993). After his second application for parole was denied, Zukowski, who had been convicted of second-degree murder, was mistakenly released from prison, based on an incorrect message from a parole board clerk to the prison. Over the next six months Zukowski's parole officer, to whom Zukowski was reporting, failed to discover the mistake. Six months after he was released, Zukowski raped, beat, and threatened the plaintiff, Jean W.

Jean W. sued the Commonwealth, the Department of Correction, and the Parole Board, under the Massachusetts Tort Claims Act, G. L. c. 258, claiming that they were negligent in wrongfully releasing Zukowski and in failing to discover the error. The Superior Court dismissed the suit based on the "public duty" rule, which shields governmental units from liability unless the injured person can show that the duty breached was owed to the individual him or herself, and not merely to the public at large.

On appeal, a majority of the SJC held that the "public duty" rule should be abandoned, agreeing that they intended to abolish the rule at the first opportunity following the 1993 legislative session, giving the Legislature an opportunity to impose new limits if it chooses, for instance by providing more stringent protection for certain activities.

Abolition of the "public duty" rule means that a governmental agency is no longer shielded from liability because its duty to act is a duty to the public at large and not to an identifiable individual or group of individuals. Without the "public duty" rule, plaintiffs suing public entities will still bear the burden of proving a breach of the duty, causation, and damages.

Public records law does not restrict Labor Relations Commission's power to subpoena internal affairs division logs, cards and files concerning pending complaint. Boston Police Superior Officers' Federation v. Boston, 414 Mass. 458 (1993). In March, 1988, 33 police sergeants were promoted to lieutenant, but the president of the Boston Police Superior Officers Federation was not promoted. The Federation filed a suit with the Labor Relations Commission alleging that the police commissioner was retaliating for the president's union activities in violation of the public employee's labor relations law. The Federation sought subpoenas requiring the city to produce internal affairs division logs, cards, and files. The Labor Relations Commission directed the city to produce the documents. On appeal, the Supreme Judicial Court held that the public records law and its exceptions does not restrict the Labor Relations Commission's power to subpoena documents in connection with a complaint pending before it.

D. Juvenile Transfer Hearings.

Juvenile who intends to offer expert psychiatric evidence based on his or her own statements can be ordered to submit to examination by psychiatrist retained by Commonwealth. Commonwealth v. Wayne W., 414 Mass. 218 (1993). The SJC concluded that G.L. c. 119, § 61, providing for the transfer of certain juvenile matters to the Superior Court, does not violate the due process or equal protection provisions of the state or federal constitutions by establishing the following requirements. When a child is charged with first or second degree murder, once the juvenile court determines that there is probable cause to believe the juvenile committed the crime, the statute establishes a rebuttable presumption that such child presents a significant danger to the public and is not amenable to rehabilitation within the juvenile justice system. This

means that the juvenile has the initial burden of producing evidence to show that he or she is not dangerous and is a suitable candidate for rehabilitation. The Court noted that where there is evidence warranting a finding beyond a reasonable doubt that the juvenile committed murder, it is reasonable to assume that the juvenile is dangerous and may not be amenable to rehabilitation.

The Court also held that the statute does not violate the state or federal constitution by reducing the evidentiary standard for transfer of the case from clear and convincing evidence to a preponderance of the evidence. The Court noted that determining a juvenile's dangerous and/or amenability to rehabilitation is imprecise and subjective, and that providing for a higher standard of proof is not likely to result in more accurate determinations.

The Court also held that, although the privilege against self-incrimination forecloses the Commonwealth from compelling the juvenile to submit to a psychiatric examination where the juvenile does not seek to introduce his or her own psychiatric evidence at a transfer hearing, where the juvenile voluntarily chooses to introduce expert psychiatric evidence which includes his or her own statements, the juvenile court can order the juvenile to submit to an examination by a psychiatrist retained by the Commonwealth. The Court noted that no examination can be ordered unless the juvenile judge determines that the juvenile intends to offer psychiatric evidence, or there is a reasonable likelihood that such evidence will be offered. The judge, on motion by the Commonwealth or on his or her own order, may direct the juvenile to disclose whether he or she intends to offer such evidence. The Court also noted that the order must contain the limits of use of the evidence required by the state and federal constitutions, including the fact that the evidence is not admissible at proceedings to adjudicate guilt. See also Charles C. v. Commonwealth, 415 Mass. 58 (1993).

Juvenile Court judge improperly limited both party's use of psychiatric testimony, and failed to take into account statutory factors for determining amenability to rehabilitation. Commonwealth v. Clifford C., 415 Mass. 38 (1993). The juvenile was charged with murder and assault with intent to murder. Pursuant to the recent amendments to G.L. c. 119, §61, the Commonwealth moved to transfer the juvenile to the Superior Court for trial as an adult. The juvenile judge conducted Part A of the transfer hearing and determined that there was probable cause that the juvenile committed the offenses. After Part B of the transfer hearing, however, the judge denied the Commonwealth's request for transfer,

concluding that, although the juvenile was dangerous, he was amenable to rehabilitation in the juvenile system, relying exclusively on the opinion of a court psychologist. The Commonwealth appealed the ruling.

Prior to the transfer hearing, the juvenile retained experts, and was prepared to offer their testimony. The judge denied the Commonwealth's request that the juvenile submit to an examination by an expert retained by the Commonwealth, and excluded the testimony of the juvenile's experts. The Supreme Judicial Court concluded that the juvenile judge should have, but failed to, consider most of the factors set forth in the statute which must be taken into account in making a transfer decision. The SJC also concluded that both parties should have been given an opportunity to present additional psychiatric testimony on the question of the juvenile's amenability to rehabilitation.

E. Conditions Of Confinement Of Prisoners.

When isolation given as discipline, authorities must follow procedure mandated by Supreme Court. O'Malley v. Sheriff of Worcester County, 415 Mass. 132 (1993). The SJC held that, when prison authorities may impose isolation time on an inmate as the result of a disciplinary proceeding, they must follow the procedures outlined by the United States Supreme Court to satisfy the inmates due process rights. Under these procedures, the prisoner must receive: (1) advance written notice of the disciplinary charges; (2) an opportunity, where consistent with institutional safety and correctional goals, to call witnesses and to present evidence in his or her defense; and (3) a written statement by the factfinder of the evidence relied on and the reasons for the disciplinary action. Distinguishing isolation from administrative segregation, the Court noted that regardless of the location, whether it is in the inmates own cell, a special isolation unit, or an isolation cell, isolation involves more than a loss of privileges; it involves a significant loss of freedom, opportunity for exercise or earning good time credits, as well as contact with visitors and others.

ASSISTANCE AND CONTACTS AT THE OFFICE OF THE ATTORNEY GENERAL

Below is a list of individuals at the Office of the Attorney General who you can call for assistance. The main office number for all extensions listed below is (617) 727-2200. The office address is: Office of the Attorney General, One Ashburton Place, Boston, MA 02108.

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